

BALANCING THE SCALES: STUDENT SURVIVORS' INTERESTS AND THE MATHEWS ANALYSIS

SAGE CARSON¹ AND SARAH NESBITT²

In response to activism by student survivors of sexual violence beginning in the early 2010s, respondents—those students named as abusers and harassers in sexual misconduct cases—and their advocates have recently turned to the courts. To date, respondents have filed over 500 due process claims to challenge the fairness of their schools' sexual misconduct disciplinary proceedings. Courts assessing these due process claims apply the *Mathews v. Eldridge* balancing test, the governing procedural due process framework. The *Mathews* balancing test instructs courts to weigh: 1) the private interests at stake; 2) the risk of erroneous deprivation using current procedures; and 3) the public interests at stake. The underlying facts in *Mathews* concerned two parties—the party facing a deprivation and the charging institution. But *Mathews* did not contemplate the structure of cases where one student has allegedly harmed another, meaning there is an additional party to consider: a complaining student. Sexual misconduct cases, like other harassment, discrimination, and violence cases, have this unique three-party structure. By applying the *Mathews* balancing test—a due process framework built on a two-party case—to what are in fact three-party cases, courts fail to adequately account for all of the interests at stake. As a result, student survivors have been pushed off the scales of justice when courts consider what process is due to student respondents. But the *Mathews* framework, when properly applied, includes universities' broader goals as well as survivors' interests. To preserve the rights and respect the interests of all respondents, survivors, and schools alike, the courts must adequately balance all of the interests at stake, accounting for survivors' interests in the realms of education, reputation, and future prospects under the third *Mathews* factor. While there are legislative, administrative, and institutional ways to pursue fairness in campus sexual misconduct disciplinary proceedings, the courts are the constitutional backstop for each of these avenues. Only once survivors' interests have been restored to the scales in *Mathews* analyses will advocates have the opportunity to achieve truly fair, balanced processes.

¹ Manager of Know Your IX; University of Delaware 2017.

² Policy Organizer at Know Your IX; Georgetown Law 2021. We would like to thank Alexandra Brodsky, Adele Kimmel, and Nancy Cantalupo for their invaluable guidance, thoughtful editing, and continued encouragement. We would also like to thank the editors of this journal, especially Virginia Wright, for being the most gracious editors we could have asked for. Finally, thank you to our friends and fellow organizers, past and present, at Know Your IX as well as to the many survivors who have shared their stories to challenge the status quo, and the many more who never will.

I.	<i>The Battle Over Title IX</i>	323
A.	<i>The Rise of the Student Survivors' Rights Movement</i> ...	324
B.	<i>The Growing Respondents' Rights Movement</i>	329
II.	<i>Leaving Survivors Off the Scales</i>	339
A.	<i>The Supreme Court Bedrock</i>	340
B.	<i>Opportunities for Inclusion: Universities and the Mathews Analysis</i>	343
C.	<i>Opportunities for Inclusion: Complainants' Distinct Interests</i>	345
i.	<i>Continued Access to Education</i>	345
ii.	<i>Reputation</i>	350
iii.	<i>Professional and Financial Prospects</i>	352
D.	<i>Prevailing Applications of Mathews</i>	355
III.	<i>Restoring Survivors to the Scales</i>	368
A.	<i>Department of Education</i>	368
B.	<i>Legislatures</i>	369
C.	<i>Colleges and Universities</i>	370
D.	<i>Courts</i>	372
IV.	<i>Conclusion</i>	374

On September 8th, 2017, Secretary of Education Betsy DeVos announced in a speech at George Mason University that she would be rescinding the 2011 Dear Colleague Letter (hereinafter 2011 DCL)³—a Title IX guidance letter meant to ensure colleges and universities knew how to properly and fairly respond to reports of sexual harassment or violence. DeVos claimed she was motivated to rescind the guidance because of what she had seen as a failure of schools to uphold due process,⁴ stating:

Through intimidation and coercion, the failed system has clearly pushed schools to overreach. With the heavy hand of Washington tipping the balance of her scale, the sad reality is that Lady Justice is not blind on campuses today. . . . Due process is the foundation of any system of justice that seeks a fair outcome. Due process either protects everyone, or it protects no one.⁵

Although DeVos continuously stated she would not turn her back on student survivors, her words and her actions did not align. DeVos met with survivors and their advocates only once,⁶ while she and other Department of

³ Susan Svrluga, *Transcript: Betsy DeVos's Remarks on Campus Sexual Assault*, WASH. POST (Sept. 7, 2017), <https://www.washingtonpost.com/news/grade-point/wp/2017/09/07/transcript-betsy-devoss-remarks-on-campus-sexual-assault/> [https://perma.cc/NUQ8-3B7Z].

⁴ *Id.*

⁵ *Id.*

⁶ Katelyn Burns, *These Groups Met with Betsy DeVos on Changing Campus Rape Guidelines. Now They're Backing Brett Kavanaugh*, REWIRE.NEWS (Oct. 3, 2018), <https://>

Education staff continued to meet and work with key players in the respondents' rights movement.⁷ Further, DeVos replaced prior Title IX guidance with her interim guidance, which created an unbalanced system that offered special rights to respondents only⁸ and was in direct conflict with the Bush Administration's persisting 2001 guidance.⁹ About a year later, DeVos issued her proposed rule on Title IX that not only drastically tipped the scales in favor of respondents but also acted as a shield against liability for schools that fail to ensure survivors' access to education, contrary to the directives of Title IX.

DeVos' inability to fairly balance student survivors' rights and interests with respondents' due process rights reflects a growing and concerning trend. As the movement for respondents' rights has grown, shifting the attention of campus sexual assault from survivors to the rights of respondents, survivors' interests in their fair and equal access to education has been ignored by popular press, the Department of Education, and—most recently—the courts.

In recent years, students found responsible for sexual misconduct who believe their due process rights were violated have increasingly turned to the courts.¹⁰ Today, more than five hundred civil suits of this kind have been filed.¹¹ These suits have focused on universities' alleged failure to provide

rewire.news/article/2018/10/03/these-groups-met-with-betsy-devos-on-changing-campus-rape-guidelines-now-theyre-backing-brett-kavanaugh/ [https://perma.cc/5693-2ZJK].

⁷ See, e.g., Email from Gregory J. Josefchuk, President, National Coalition for Men Carolinas to Candice Jackson, Acting Assistant Secretary, Office for Civil Rights, U.S. Dep't of Educ. (Sep. 5, 2017), in Freedom of Information Act Response, 137–53 (Politico, 2019) (on file with authors); Email from Gregory J. Josefchuk, President, National Coalition for Men Carolinas to James Ferg-Cadima, Acting Deputy Assistant Secretary for Policy & Senior Counsel, Office for Civil Rights, U.S. Dep't of Educ. (June 23, 2017) in Freedom of Information Act Response, 154–56 (Politico, 2019) (on file with authors).

⁸ Elizabeth Tang, *Betsy DeVos is Giving Alleged Rapist Special Rights*, NAT'L WOMEN'S L. CTR. (Sep. 28, 2017), <https://nwlc.org/blog/betsy-devos-is-giving-alleged-rapists-special-rights/> [https://perma.cc/DE6E-9VNX].

⁹ Compare OFF. FOR CIVIL RIGHTS, U.S. DEP'T EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES 21 (2001) [hereinafter 2001 SEXUAL HARASSMENT GUIDANCE], <https://www2.ed.gov/about/offices/list/ocr/docs/shguidee.pdf> [https://perma.cc/UJV2-P2VZ] (stating that “[i]n some cases, such as alleged sexual assaults, mediation will not be appropriate even on a voluntary basis.”) with OFF. FOR CIVIL RIGHTS, U.S. DEP'T EDUC., Q&A ON CAMPUS SEXUAL MISCONDUCT 4 (2017) [hereinafter 2017 Q&A] <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf> [https://perma.cc/YEY4-8FHY] (offering in contrast, “[i]f all parties voluntarily agree to participate in an informal resolution that does not involve a full investigation and adjudication after receiving a full disclosure of the allegations and their options for formal resolution and if a school determines that the particular Title IX complaint is appropriate for such a process, the school may facilitate an informal resolution, including mediation, to assist the parties in reaching a voluntary resolution.”).

¹⁰ Emily Yoffe, *Joe Biden's Record on Campus Due Process Has Been Abysmal. Is It a Preview of His Presidency?*, REASON (Nov. 12, 2019), <https://reason.com/2019/11/12/joe-bidens-record-on-campus-due-process-has-been-abysmal-is-it-a-preview-of-his-presidency/#> [https://perma.cc/W4F8-ZXKU].

¹¹ *Id.*

notice of the allegations against a student,¹² the use of single investigator models as opposed to hearings,¹³ and concerns that there was no opportunity for live cross examination.¹⁴ But despite growing national conversations painting Title IX as creating systems that favor survivors across the board, the reality for student survivors is much bleaker. Survivors have been forced out of school,¹⁵ been punished for being raped¹⁶ or speaking out,¹⁷ lost thousands of dollars,¹⁸ died by suicide,¹⁹ and been killed by intimate partners after their schools refused to take action to keep them safe.²⁰ Currently, about a third of survivors are forced out of school because of violence against them, coupled with their schools' indifference to their complaints.²¹ Despite the harms that survivors have faced and their obvious stake in campus misconduct disciplinary proceedings, courts have largely failed to consider their interests.

In respondents' lawsuits, the courts apply prevailing precedent to balance the rights at stake in a campus sexual misconduct disciplinary proceeding and determine what process requirements are constitutionally due to respondents. They then analyze whether the process the respondents were afforded in the proceeding below meets that bar. That due process analysis is governed by the *Mathews v. Eldridge* balancing test, which instructs courts

¹² See, e.g., *Harnois v. Univ. of Mass. at Dartmouth*, No. 1:19-cv-10705, 2019 WL 5551743, at *8 (D. Mass. Oct. 28, 2019).

¹³ See, e.g., *Doe v. Vanderbilt Univ.*, No. 3:18-cv-00569, 2019 WL4748310, at *14 (M.D. Tenn. Sept. 30, 2019).

¹⁴ See, e.g., *Messeri v. Univ. of Colo., Boulder*, No. 1:18-cv-2658, 2019 WL 4597875, at *17 (D. Colo. Sept. 23, 2019).

¹⁵ See, e.g., Audrey Chu, *I Dropped Out of College Because I Couldn't Bear to See My Rapist on Campus*, VICE (Sep. 26, 2017), https://www.vice.com/en_us/article/qvjzpd/i-dropped-out-of-college-because-i-couldnt-bear-to-see-my-rapist-on-campus [https://perma.cc/X9V2-63ZX].

¹⁶ See, e.g., Nora Caplan-Bricker, "My School Punished Me," SLATE (Sep. 19, 2016), <https://slate.com/human-interest/2016/09/title-ix-sexual-assault-allegations-in-k-12-schools.html> [https://perma.cc/H9JQ-EQGE]; Tyler Kingkade, *Girl Suspended after Being Sexually Assaulted in School Stairwell*, BUZZFEED NEWS (Sep. 22, 2016), <https://www.buzzfeednews.com/article/tylerkingkade/girl-suspended-after-being-sexually-assaulted-in-school-stai> [https://perma.cc/26KE-WB65].

¹⁷ See, e.g., Alanna Vagianos, *A Sexual Assault Survivor at Princeton Tried to Protest. Instead, She Was Fined \$2,700*, HUFFPOST (May 16, 2019), https://www.huffpost.com/entry/sexual-assault-survivor-princeton-protests-title-ix_n_5cdad56ee4b0615b0819c2a2 [https://perma.cc/AVG3-3UCJ].

¹⁸ See, e.g., Jenavieve Hatch, *First They Told Their Stories. Now They Want Their Money*, HUFFPOST (May 12, 2019), https://www.huffpost.com/entry/usc-msu-financial-restitution_n_5cc9bd17e4b0913d078b76d9 [https://perma.cc/MDM6-7KBQ].

¹⁹ See, e.g., Tyler Kingkade, *A 19-Year-Old Killed Herself, and the Family Says Her School Could've Saved Her*, BUZZFEED NEWS (Feb. 4, 2017), <https://www.buzzfeednews.com/article/tylerkingkade/a-19-year-old-killed-herself-and-the-family-says-her-school> [https://perma.cc/8WJX-ZLSC].

²⁰ See, e.g., Jeremy Bauer-Wolf, *Prejudicial Police Department?*, INSIDE HIGHER ED (July 15, 2019), <https://www.insidehighered.com/news/2019/07/15/parents-slain-university-utah-student-sue-under-title-ix> [https://perma.cc/G232-PXJS].

²¹ See Cecilia Mengo & Beverly M. Black, *Violence Victimization on a College Campus: Impact on GPA and School Dropout*, 18 J. OF C. STUDENT RETENTION 234, 243 (2015).

to weigh 1) the private interests at stake, 2) the risk of erroneous deprivation using current procedures, and 3) the public interests at stake.²² Like those in *Mathews*, the underlying facts in *Goss v. Lopez*, 419 U.S. 565 (1975), the seminal school discipline case, concerned two parties—the student facing a deprivation and the institution charged with levying sanctions. Their interests balanced against each other to yield the process due. But those cases did not contemplate the structure of cases where one student has allegedly harmed another, meaning there is an additional party to consider: a complaining student. Sexual misconduct cases, like other harassment, discrimination, and violence cases, have that three-party structure. We posit that by applying the *Mathews* balancing test—a due process framework built on a two-party case—to what are in fact three-party cases, courts fail to adequately account for all of the interests at stake. In the process, the interests of student survivors who have come forward as complainants have been widely ignored in the balance of what process is due to respondents, yielding incomplete analyses.

But the *Mathews* framework has the capacity to accommodate those currently omitted interests through its third prong: the public interest. In this article, we set the backdrop for Title IX as the recent battleground for gender equity in access to education, overview relevant precedential cases, and delineate complainants' critical interests that are at stake in sexual misconduct cases. We conclude by offering strategies—in the legislature, the administrative state, and the courts—through which advocates can more fully promote complainants' interests in procedures constitutionally due to respondents in campus sexual misconduct proceedings.²³

I. THE BATTLE OVER TITLE IX

In recent years, colleges have become entwined in a national battle over the rights of survivors of sexual violence and what is due to respondents, students named as abusers and harassers in sexual misconduct cases. Respondents' rights groups and popular press have insisted that Title IX has forced "the pendulum [to swing] too far" in the wrong direction.²⁴ Despite

²² See *Mathews v. Eldridge*, 424 U.S. 319, 335, 347 (1976).

²³ We note that a holistic *Mathews* analysis is not the only reason for considering complainants' interests in the due process analysis. There are ample reasons for such considerations, including but not limited to policy reasons of general fairness, statutory obligations under Title IX, and constitutional ones under the Equal Protection Clause. Additionally, this truncated due process analysis is not the only fairness issue complainants face in campus sexual misconduct cases, nor is the due process analysis in court the only legal remedy for those fairness issues. Complainants wronged and erased by their schools have a plethora of injuries and rights that they may be able to vindicate through the courts in other ways. We simply focus in this article on the *Mathews* due process argument set forth here.

²⁴ Sarah Brown, *DeVos's Rules on Sexual Misconduct, Long Awaited on Campuses, Reflect Her Interim Policy*, CHRON. HIGHER EDUC. (Aug. 29, 2018), <https://www.chronicle.com/article/DeVos-s-Rules-on-Sexual/244394> [<https://perma.cc/CA7L-BNRS>].

the possibility for collaboration, some who advocate for respondents' rights have chosen to do so by ignoring the experiences of student survivors of sexual violence and claiming that schools favor student survivors over respondents.²⁵ In actuality, schools have widely denied student survivors basic educational protections and continually pushed them out of school.²⁶ In an effort to "balance the scales," which they believe were tipped in favor of survivors because of prior administrative enforcement and survivor activism, respondents have taken to the courts.

A. *The Rise of the Student Survivors' Rights Movement*

On the morning of July 15, 2013, the organizers of ED Act Now rallied outside the Department of Education, side-by-side with dozens of student survivors and their allies, in anticipation of the delivery of their petition. The organizers demanded the Department "step up to hold colleges and universities publicly accountable for complying with federal law . . . [and] protecting survivors of sexual assault like us."²⁷ In the preceding months, student survivors had begun to file complaints with Department of Education's Office for Civil Rights (OCR) regarding their schools' mistreatment or dismissal of their sexual harassment or violence complaints. They alleged their

²⁵ Families Advocating for Campus Equality, Comment on *ED Docket No. ED-2018-OCR-0064, RIN 1870-AA14, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, <https://static1.squarespace.com/static/5941656f2e69cfcdcb5210aa/t/5ccbd44ff4e1fcdaca50141f/1556862039627/FACE+NPRM+TITLE+IX+COMMENT+Docket+No.+ED-2018-OCR-0064+ed.+copy.pdf> [<https://perma.cc/C4MH-9K5W>] ("Previous Department guidance caused educational institutions to tilt the scales of justice in favor of complainants.").

²⁶ See, e.g., Tyler Kingkade, *Schools Keep Punishing Girls — Especially Students of Color — Who Report Sexual Assaults, and the Trump Administration's Title IX Reforms Won't Stop It*, THE74MILLION (Aug. 6, 2019), <https://www.the74million.org/article/schools-keep-punishing-girls-especially-students-of-color-who-report-sexual-assaults-and-the-trump-administrations-title-ix-reforms-wont-stop-it/> [<https://perma.cc/P6UK-D28M>]; Caroline Kitchener, *She Reported Her Sexual Assault. Her High School Suspended Her for 'Sexual Impropriety'*, LILY (Aug. 26, 2019), <https://www.thelily.com/she-reported-her-sexual-assault-her-high-school-suspended-her-for-sexual-impropriety/> [<https://perma.cc/P8LX-CY7H>]; Ben Chapman, *Brooklyn School Punished Intellectually Disabled Girl who Was Gang Raped by Students and Tried Keeping it Secret: Lawsuit*, N.Y. DAILY NEWS (Jan. 11, 2018), <https://www.nydailynews.com/new-york/education/brooklyn-school-punished-gang-rape-victim-article-1.3750411> [<https://perma.cc/U7BV-2Z6L>]; Sarah Brown, *BYU Is Under Fire, Again, for Punishing Sex-Assault Victims*, CHRON. HIGHER EDUC. (Aug. 6, 2018), <https://www.chronicle.com/article/BYU-Is-Under-Fire-Again-for/244164> [<https://perma.cc/ZTZ9-WECG>]; Tyler Kingkade, *The Woman Behind #SurvivorPrivilege Was Kicked Out of School After Being Raped*, HUFFPOST (Jun. 13, 2014), https://www.huffpost.com/entry/survivor-privilege-wagatwe-wanjuki_n_5489170 [<https://perma.cc/3TUH-Y63N>]; Chu, *supra* note 15.

²⁷ Know Your IX, Petition to *Department of Education*, CHANGE.ORG [hereinafter Know Your IX Petition], <https://www.change.org/p/department-of-education-hold-colleges-accountable-that-break-the-law-by-refusing-to-protect-students-from-sexual-assault> [<https://perma.cc/XK8N-NNK8>] (last visited Feb. 29, 2020).

schools had violated federal law by failing to restore their right to an education free from sex discrimination.²⁸

As courts have long recognized, gender-based violence and discrimination can gravely impact student survivors' ability to access their right to an education free from sex discrimination, as guaranteed by Title IX.²⁹ In short, it can be hard to learn in school if your teacher or classmates are sexually harassing you, you have to share educational spaces with your rapist or abusive partner, or a faculty member's gender bias is hindering your ability to succeed. Title IX provides: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance."³⁰ In the 1977 case *Alexander v. Yale University*, courts first established that under Title IX, sexual harassment constitutes sex discrimination that jeopardizes a student's access to education.³¹ Later court decisions clarified schools' obligations under Title IX to respond to and remedy sexual violence,³² and the Department of Education's Office for Civil Rights further explained schools' obligations beginning in the 1990s.³³

In OCR's 1997 and 2001 administrative guidance, the Department explained that schools violate Title IX when they fail to take "immediate effective action" to a) stop or remedy a hostile environment created by sexual harassment or violence, or b) prevent its reoccurrence.³⁴ This guidance required schools to "adopt and publish grievance procedures providing for prompt and equitable resolution of sex discrimination complaints, including complaints of sexual harassment, and to disseminate a policy against sex discrimination."³⁵ OCR investigations and findings further clarified specific procedural protections for students. For example, schools such as Georgetown University were deemed in violation of Title IX because "complaints of sexual harassment were resolved using a clear and convincing evidence standard, a higher standard than the preponderance of the evidence

²⁸ See Rachel Axon, *Colleges Under Fire for Handling of Sexual Assault Cases*, USA TODAY (Apr. 24, 2014) (updated Apr. 25, 2014), <https://www.usatoday.com/story/sports/college/2014/04/24/sexual-assault-colleges-jameis-winston-president-obama/8122831/> [<https://perma.cc/H49U-RYTP>] (discussing multiple survivors who filed complaints with OCR saying their schools mishandled sexual harassment and assault allegations, which fall within the purview of Title IX's bar on sex discrimination in education).

²⁹ See, e.g., *Alexander v. Yale*, 631 F.2d 178, 182 (2d Cir. 1980).

³⁰ Title IX of the Education Amendments of 1972, Pub. L. No. 92-318, § 901(a), 86 Stat. 235, 373 (codified at 20 U.S.C. § 1681(a) (2012)).

³¹ See *Alexander v. Yale*, 459 F. Supp. 1, 4 (D. Conn. 1977).

³² See *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 648 (1999).

³³ See, e.g., OFF. FOR CIVIL RIGHTS, U.S. DEP'T EDUC., SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES (1997), <https://www2.ed.gov/about/offices/list/ocr/docs/sexhar01.html> [<https://perma.cc/UJ9Z-VFQD>].

³⁴ See 2001 SEXUAL HARASSMENT GUIDANCE, *supra* note 9, at 12.

³⁵ *Id.* at 14.

standard, which is the appropriate standard under Title IX.”³⁶ In 2011, OCR issued a new Dear Colleague Letter, further clarifying schools’ duties to respond to sexual harassment and violence.³⁷

Despite OCR’s clarifications and courts’ affirmations that student survivors of sexual violence were protected under Title IX, schools largely ignored their obligations to support survivors. Student survivors were forced out of school because of administrative inaction or even directly asked to leave campus until their rapist graduated. As Know Your IX co-founder Dana Bolger shared:

On my campus alone, students who experienced sexual or dating violence were discouraged from reporting, denied counseling and academic accommodations, and pressured to take time off. When I reported abuse to my school, I was told I should drop out, go home and take care of myself, and return when my rapist graduated. All of us were denied our right to learn free from gender violence.³⁸

It is because of that inaction that student activism exploded. Survivors began flooding the Department with OCR complaints,³⁹ and ED Act Now petitioned the Department to begin holding schools accountable to their duties to conduct timely investigations of complaints and proactive investigations of

³⁶ Letter from Sheralyn Goldbecker, Team Leader, Office for Civil Rights, U.S. Dep’t Educ., to Dr. John J. DeGioia, President, Georgetown University 3 (May 5, 2004); *see also* Letter from Howard Kallem, Chief Attorney, D.C. Enforcement Office, to Jane E. Genster, Vice President and General Counsel, Georgetown University 1 (October 16, 2003), available at <http://www.ncherm.org/documents/202-GeorgetownUniversity-110302017Genster.pdf> [<https://perma.cc/4X69-7ET4>] (“[I]n order for a recipient’s sexual harassment grievance procedure to be consistent with Title IX standards, the recipient must draw conclusions about whether the particular conduct rises to the level of sexual harassment using a preponderance of the evidence standard.”); Letter from Gary Jackson, Regional Civil Rights Director, Region X, Office for Civil Rights, U.S. Dep’t Educ., to Jane Jervis, President, The Evergreen State College 8, 9 (Apr. 4, 1995), available at http://www2.ed.gov/policy/gen/leg/foia/misc-docs/ed_ehd_1995.pdf [<https://perma.cc/5RGJ-SAH9>] (noting that “[t]he evidentiary standard of proof applied to Title IX actions is that of a ‘preponderance of the evidence’” and concluding that the recipient’s use of the clear and convincing evidence standard violated Title IX).

³⁷ Dear Colleague Letter from Russlyn Ali, Assistant Secretary, Office for Civil Rights, U.S. Dep’t Educ. (Apr. 4, 2011) [hereinafter 2011 Dear Colleague Letter], <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [<https://perma.cc/5XRU-Z4WE>].

³⁸ *Combating Campus Sexual Assault: Hearing on Reauthorizing The Higher Education Act Before the S. Comm. on Health, Educ., Labor, and Pensions*, 114th Cong. 1–7 (2015) (statement of Dana Bolger, Know Your IX Co-Founder) [hereinafter, Bolger Statement], <https://www.help.senate.gov/imo/media/doc/Bolger.pdf> [<https://perma.cc/V4ZN-4TFP>].

³⁹ *See, e.g., Title IX Tracking Sexual Assault Investigation*, CHRON. HIGHER EDUC. <http://projects.chronicle.com/titleix/> [<https://perma.cc/9PHG-STXN>] (last updated Feb. 29, 2020) (“So far, 197 cases have been resolved and 305 remain open.”).

possible bad actors.⁴⁰ Advocates also pushed broadly for transparency from the Department with respect to its investigations and enforcement actions.⁴¹

Beginning in 2013, student survivors organized mass actions against their schools for the institutions' failure to uphold survivors' Title IX rights. At Columbia University, Emma Solkowitz launched her iconic performance art piece, "Carry That Weight," in which she carried a mattress around campus to symbolize the weight campus sexual assault survivors carry with them as they navigate a campus shared with their rapists.⁴² Solkowitz's performance grew into a national movement where students at campuses across the country began carrying mattresses in protest of their schools' mishandling of survivors' complaints.⁴³ Students at St. Olaf college wore shirts reading, "Ask me how my college is protecting rapists."⁴⁴ The "It Happens Here" project launched on campuses across the country provided a survivor-centered storytelling platform to expose the high rates of sexual assaults at educational institutions.⁴⁵ Additionally, students at Amherst College, inspired by

⁴⁰ See, e.g., ED ACT NOW (July 24, 2013), <https://edactnow.tumblr.com/post/56350266714/official-asks-to-the-department-of-education> [<https://perma.cc/56JY-K2T2>]; Know Your IX Petition, *supra* note 27.

⁴¹ Specifically, the organizers demanded that the Department

[A]dvertise the Title IX complaint process and publish filings, findings and resolutions to adequately alert students to the risk of sexual violence on campus Complainants should be able to track the progress of their Title IX complaint so that it is not lost or neglected. The filing, investigation, and findings of a complaint should be publicly accessible with all identifying information redacted to preserve privacy for the survivor involved. Noncompliance findings and sanctions should also be public to appropriately shame schools that have violated their federal obligations. *Id.*

⁴² See, e.g., Roberta Smith, *In a Mattress, a Lever for Art and Political Protest*, N.Y. TIMES (Sept. 22, 2014), <https://www.nytimes.com/2014/09/22/arts/design/in-a-mattress-a-fulcrum-of-art-and-political-protest.html> [<https://perma.cc/CAG2-49XN>] ("‘Carry that Weight,’ which is beginning its fourth week, involves Ms. Sulkowicz carrying a 50-pound mattress wherever she goes on campus . . . to call attention to her plight and the plight of other women who feel university officials have failed to deter or adequately punish such assaults.”).

⁴³ See, e.g., Alexandra Svokos, *Students Bring Out Mattresses in Huge ‘Carry That Weight’ Protest Against Sexual Assault*, HUFFPOST (Nov. 29, 2014), https://www.huffpost.com/entry/carry-that-weight-columbia-sexual-assault_n_6069344 [<https://perma.cc/4KJK-PA3S>] (describing Carry That Weight actions led by student activists across the United States).

⁴⁴ See, e.g., Claire Lampen, *Ask This Student How Her College Is Protecting Her Rapist*, MIC (May. 3, 2016), <https://www.mic.com/articles/142089/ask-this-student-how-her-college-is-protecting-her-rapist> [<https://perma.cc/2RB7-XLKU>] (“Her shirt reads, ‘Ask me how my college is protecting my rapist.’ And if you ask, Madeline will tell you: St. Olaf College — a small liberal arts school in Northfield, Minnesota — is protecting him not through active shielding, but through systemic passivity.”).

⁴⁵ THE IT HAPPENS HERE PROJECT, <http://www.ihhproject.org> [<https://perma.cc/8SJ3-A795>] (last visited Dec. 14, 2019).

Project Unbreakable,⁴⁶ used posters to publicize their school administrators' inappropriate responses to their complaints of sexual violence.⁴⁷

This wave of student survivor activism brought campus sexual assault into the national consciousness. Popular media including *The Daily Show*,⁴⁸ CNN,⁴⁹ *Real Time with Bill Maher*,⁵⁰ and MSNBC⁵¹ began discussing the high rates of sexual violence in colleges and the failure of schools to properly respond. Documentaries like *The Hunting Ground*⁵²—and, more recently, *Audrie and Daisy*⁵³—highlighted the stories of survivors who had been wronged by their schools and local police in the wake of violence. In response, the Obama Administration launched national campaigns⁵⁴ and task forces to address sexual violence in college,⁵⁵ and schools began to change their policies and procedures in response to further Title IX guidance from the Department⁵⁶ and its enforcement by OCR.⁵⁷

Student survivor activists had one simple ask: for schools to do their job. Mired in the status quo, however, universities resisted taking action against star athletes⁵⁸ and valedictorians accused of sexual assault⁵⁹—and in

⁴⁶ PROJECT UNBREAKABLE, <https://projectunbreakable.tumblr.com> [<https://perma.cc/V5AV-JHNZ>] (last visited Dec. 14, 2019).

⁴⁷ Dana Bolger, *Surviving, at Amherst College*, IT HAPPENS HERE: AMHERST (Oct. 23, 2012), <https://ithappenshereamherst.wordpress.com/2012/10/23/survivingatamherstcollege/> [<https://perma.cc/ASM4-ZN46>].

⁴⁸ THE DAILY SHOW: THE FAULT IN OUR SCHOOLS (Comedy Central Jun. 25, 2014), <http://www.cc.com/video-clips/z2b627/the-daily-show-with-jon-stewart-the-fault-in-our-schools> [<https://perma.cc/PT4U-GPHS>].

⁴⁹ Emanuella Grinberg, *Ending Rape on Campus: Activism Takes Several Forms*, CNN (Feb. 12, 2014), <https://www.cnn.com/2014/02/09/living/campus-sexual-violence-students-schools/index.html> [<https://perma.cc/PFG8-E83B>].

⁵⁰ *Real Time With Bill Maher*, *Real Time With Bill Maher: The Hunting Ground (HBO)*, YOUTUBE (Mar. 17, 2015), https://www.youtube.com/watch?v=JINxoR-S5To&feature=emb_title [<https://perma.cc/4JFD-7UCA>].

⁵¹ ENDING CAMPUS SEXUAL ASSAULT: A PANEL, (MSNBC Dec. 14, 2014), <https://www.msnbc.com/shift/watch/campus-sexual-assault-roundtable-372410947817> [<https://perma.cc/VER9-Z2WU>].

⁵² THE HUNTING GROUND FILM (Chain Camera Films 2015).

⁵³ AUDREY AND DAISY DOCUMENTARY (Netflix 2016).

⁵⁴ *The Story of Our Movement*, IT'S ON US, <https://www.itsonus.org/history/> [<https://perma.cc/7USP-JKKF>] (last visited Dec. 14, 2019).

⁵⁵ WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT, PREVENTING AND ADDRESSING CAMPUS SEXUAL MISCONDUCT: A GUIDE FOR UNIVERSITY AND COLLEGE PRESIDENTS, CHANCELLORS, AND SENIOR ADMINISTRATORS 1–14 (2017).

⁵⁶ *See, e.g.*, Letter from the Nat'l Women's Law Center, et al. to Education Secretary John King, NAT'L WOMEN'S L. CTR. (July 13, 2016), 1, <https://nwlc.org/resources/sign-on-letter-supporting-titleix-guidance-enforcement/> [<https://perma.cc/K6PR-Y4R5>] (“These guidance documents and increased enforcement of Title IX by the Office for Civil Rights have spurred schools to address cultures that for too long have contributed to hostile environments which deprive many students of equal educational opportunities.”).

⁵⁷ *Id.*

⁵⁸ *See, e.g.*, Marissa Payne, *Erica Kinsman, Who Accused Jameis Winston of Rape, Tells Her Story in New Documentary 'The Hunting Ground'*, WASH. POST (Feb. 19, 2015), <https://www.washingtonpost.com/news/early-lead/wp/2015/02/19/erica-kinsman-who-accused-jameis-winston-of-rape-tells-her-story-in-new-documentary-the-hunting-ground/> [<https://perma.cc/5UAB-BDST>].

the process let lesser known student perpetrators off the hook as well.⁶⁰ They refused to respond to violence that happened off campus, regardless of its impact on the survivor's access to education, sometimes forcing survivors to drop out of school entirely.⁶¹ They also dragged their feet when adjudicating cases of sexual violence, sometimes for years.⁶² As OCR increased enforcement of Title IX in response to the increased student organizing, student survivors also pushed legislators to cement their rights.⁶³ The rise of student activism pushed forward proactive legislation in Congress⁶⁴ and numerous state legislatures.⁶⁵ Recently, survivor-led groups have made more formal recommendations for policy proposals on fair process in campus discipline and other potential legislation.⁶⁶

B. *The Growing Respondents' Rights Movement*

In response to the rise of student survivor activism, a new group of women organizing around sexual misconduct in school joined the national

⁵⁹ Tovia Smith, *How Campus Sexual Assaults Came To Command New Attention*, NPR (Aug. 12, 2014), <https://www.npr.org/2014/08/12/339822696/how-campus-sexual-assaults-came-to-command-new-attention> [<https://perma.cc/ZY56-CBTJ>] (“It is an abrupt turn for many schools that have treated incidents of sexual assault as teachable moments and have resisted the idea that their valedictorians or star athletes could also be predators.”).

⁶⁰ See, e.g., Bolger Statement, *supra* note 38, at 12.

⁶¹ See, e.g., Letter from Timothy Blanchard, N.Y. Office Director, Office for Civil Rights, U.S. Dep’t Educ., to Katherine S. Conway-Turner, President, Buffalo State Univ. of N.Y. 11 (Nov. 2, 2017), https://www.insidehighered.com/sites/default/server_files/media/OCR-SUNY-Buffalo-State.pdf [<https://perma.cc/85WB-UN9G>].

⁶² See, e.g., Know Your IX, *Re: ED Docket No. ED-2018-OCR-0064, RIN 1870-AA14, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance* 43 (Jan. 30, 2019) [hereinafter Know Your IX Comment], [https://actionnetwork.org/user_files/user_files/000/029/219/original/Know_Your_IX_Comment_on_Proposed_Title_IX_Rule_\(1\).pdf](https://actionnetwork.org/user_files/user_files/000/029/219/original/Know_Your_IX_Comment_on_Proposed_Title_IX_Rule_(1).pdf) [<https://perma.cc/F7GC-3NJZ>] (“It took the University of Cincinnati 519 days to expel the student I endured stalking harassment and dating violence from while I was a student there. My Title IX investigation took so long, that when I reached out to the department to follow up, my email bounced back as undeliverable. The Title IX Coordinator and her assistant had left the University without anyone follow through [sic] on my case. When the Interim Coordinator was chosen to temporarily fill the position, she had no evidence of my case existing at all; I had to start my case again from square one! All of the witnesses I provided in April 2014 were contacted in June 2016 to recall information from the 2013-2014 years.”).

⁶³ Tyler Bishop, *The Laws Targeting Campus Rape Culture*, ATLANTIC (Sep. 11, 2015), <https://www.theatlantic.com/education/archive/2015/09/the-laws-targeting-campus-rape-culture/404824/> [<https://perma.cc/Z5YJ-BZ6Z>] (“Some provisions of the federal Campus Sexual Violence Elimination (Campus SaVE) Act, the legislative outcome of years of increased attention and activism, officially went into place in July.”).

⁶⁴ See, e.g., CAMPUS SAVE ACT, <http://campussaveact.org/> [<https://perma.cc/W9BV-5M2G>] (last visited Jan. 21, 2020).

⁶⁵ See, e.g., H.B. 3476, 176th Leg., Reg. Sess. (Or. 2015). S.B. 5965, 2015-2016 Reg. Sess. (NY 2015).

⁶⁶ *State Policy Playbook*, KNOW YOUR IX, <https://www.knowyourix.org/statepolicy-playbook/> [<https://perma.cc/3NUN-C59W>] (last visited Feb. 29, 2020).

conversation: the mothers of student respondents.⁶⁷ Following the suspension of her son from the University of North Dakota for sexual assault, Sherry Warner Seefeld was “willing to do everything and anything”—including hiring a lawyer, public-relations firm, and using her political connections as a union leader—to try and reverse her son’s punishment.⁶⁸ In 2014, Warner turned her attention to the national stage, founding Families Advocating for Campus Equality (FACE) with two other mothers of student respondents.⁶⁹ The mothers argued their sons were wrongfully or falsely accused and that the campus system did not provide a fair process for respondents in Title IX cases.⁷⁰ One of the mothers, Alice True, later spun off to found a similar group called Save Our Sons (SAVE).⁷¹ These mothers prioritized one primary concern: how treatment of sexual misconduct cases within the school system and the criminal system differed, an argument premised on the purportedly unfair idea that students could be punished by their school for criminal activity without being charged by law enforcement.⁷² Further, the mothers alleged that the rise of survivor activism on college campuses had created a hostile environment for men⁷³ where they could be accused of sexual misconduct and have that accusation immediately believed⁷⁴ by the school.⁷⁵

⁶⁷ “Respondent” is the term describing the party against whom allegations of sexual misconduct are made in the context of school disciplinary process. The party who makes the complaint is called the “complainant.”

⁶⁸ Anemona Hartocollis & Christina Capecchi, ‘Willing to do Everything’: Mothers Defend Sons Accused of Campus Sexual Assaults, N.Y. TIMES (Oct. 22, 2017), <https://www.nytimes.com/2017/10/22/us/campus-sex-assault-mothers.html> [<https://perma.cc/A9MX-5UEA>] (“Seefeld said she hired a lawyer and even a public-relations firm, and used her political connections as a teachers’ union leader, to try to get the University of North Dakota to reverse her son’s three-year banishment after a woman accused him of nonconsensual sex. ‘I was willing to do everything and anything.’”).

⁶⁹ Fred Barbash, ‘Toxic Environment’ for Sons Accused of Campus Sex Offenses Turns Mothers into Militants, WASH. POST (Aug. 29, 2016), <https://www.washingtonpost.com/news/morning-mix/wp/2016/08/29/toxic-environment-for-sons-accused-of-campus-sex-offenses-turns-mothers-to-militants/> [<https://perma.cc/T7NE-DVNA>].

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Tracy Frank, *Nonprofit Supports Rights of Those Accused of Campus Sexual Assault*, BISMARCK TRIB. (Aug. 24, 2014), https://bismarcktribune.com/news/state-and-regional/nonprofit-supports-rights-of-those-accused-of-campus-sexual-assault/article_618b01ca-2b0e-11e4-bc94-001a4bcf887a.html [<https://perma.cc/NYN2-ZL46>].

⁷³ Although respondents are not exclusively men, groups like Save Our Sons and FACE position themselves as advocating for men’s rights. See Barbash, *supra* note 69.

⁷⁴ Although limited data is available about the rates of how many campus reports of sexual violence lead to a finding of responsibility, what is available shows that schools rarely side with survivors. For example, at the University of Michigan in 2017, eighteen complaints of sexual misconduct went through an investigation, four resulted in a finding of responsibility. Of those, only one resulted in an expulsion and none resulted in suspension. Office for Institutional Equity, *Student Sexual Misconduct Annual Report*, U. OF MICH. 14, <https://studentsexualmisconductpolicy.umich.edu/files/smp/FY16AnnualReport.pdf> [<https://perma.cc/6DVK-835S>].

⁷⁵ Barbash, *supra*, note 69.

Although FACE's website contains no formal policy recommendations, their founders, new leaders, and board members have publicly voiced concern over the standard of evidence in campus sexual misconduct cases, the lack of a guaranteed right to counsel, and the fact that some schools do not permit direct cross examination by the parties to the proceedings or their representatives.⁷⁶ In essence, FACE generally advocates for the imposition of criminal procedures and protections onto the campus sexual misconduct disciplinary process. They make this call by pushing for greater "due process" protections in Title IX.⁷⁷ However, as this article will explain, their invocations of this language often misconstrue the meaning of that legal term.⁷⁸

FACE vice president Cythnia Garret has called for schools to use a higher standard of proof, clear and convincing evidence, rather than the commonly used preponderance of the evidence. Garret argues that the biggest difference between the campus process and the criminal process is that in the latter, "the burden is on the accuser to prove [the defendant's guilt] beyond a reasonable doubt."⁷⁹ However, she continues, the lower burden of proof in campus processes "requires the accused to have a higher burden than just raising reasonable doubt. . . . [H]e would have to show by the same preponderance"⁸⁰ as the complainant that he is not responsible.⁸¹

Garret has also voiced concern over schools adjudicating reports of conduct that took place "outside of their jurisdiction," such as sexual assaults that occur at off-campus bars or apartments.⁸² She argues that schools would be unable to collect evidence in such scenarios since they cannot issue subpoenas, saying school administrators "don't have the same rights as in the criminal system where you can subpoena evidence."⁸³ Garrett has also alluded to wanting some type of cross examination in campus proceedings

⁷⁶ See generally FAMILIES ADVOCATING FOR CAMPUS EQUALITY, <https://www.face-campusequality.org/> [<https://perma.cc/BNV3-9DWW>] (last visited Dec. 14, 2019) (calling campus disciplinary processes "inequitable" but providing no policy positions or recommendations for best practices). We use the term "direct cross examination" throughout to describe the process whereby a party to a campus sexual misconduct disciplinary proceeding is afforded the opportunity at a live hearing to pose oral questions directly to the complainant and/or witnesses. Respondents' rights groups often call for the right to direct cross examination, either by the parties themselves or by their aligned representatives.

⁷⁷ See *id.*

⁷⁸ See Section II, *infra*.

⁷⁹ Rape Hoax, *SAVE Press Conference: Cynthia Garrett*, YOUTUBE (Apr. 28, 2015), <https://www.youtube.com/watch?v=YZJdBWrlzP8> [<https://perma.cc/4NP2-CRCU>].

⁸⁰ *Id.*

⁸¹ The most severe outcome of a campus case is expulsion, the deprivation of a property interest. Criminal cases can result in a complete loss of liberty through incarceration.

⁸² *30 Issues: Sexual Misconduct on Campus*, WNYC (Oct. 8, 2018), <https://www.wnyc.org/story/30-issues-sexual-misconduct-campus/> [<https://perma.cc/BWH6-3389>].

⁸³ In criminal cases subpoenas aren't needed for evidence collection, only a warrant or probable cause. Subpoenas are used to compel witnesses to testify. Here, Garrett conflates testimony with evidence. *Id.*

but has not made clear what she views as the ideal process for cross examination, only that it should occur.⁸⁴

The growing respondents' rights movement gained powerful advocates, including a group of Harvard Law Professors who in 2014 wrote in opposition of Harvard's new sexual misconduct policy.⁸⁵ These professors raised concerns with lack of legal representation for respondents,⁸⁶ the absence of cross examination of witnesses,⁸⁷ and the use of a single-investigator model.⁸⁸ Vocal advocate and journalist Emily Yoffe has called for an increase in due process protections for respondents in sexual misconduct cases⁸⁹ and has attacked both Republicans and Democrats for what she sees as failures to uphold the due process rights of respondents in Title IX cases.⁹⁰ Yoffe has painted sexual assault on college campuses as drunken miscommunications instead of sexual assault⁹¹—a sentiment shared by the founders of FACE.⁹² Lara Bazelon, a law professor who has lent her voice to the respondents' rights movement, has called for additional rights for respondents in campus sexual misconduct proceedings through comparisons to the

⁸⁴ *Education Secretary Proposes Enhanced Protections For Those Accused Of Sexual Assault On Campus*, NPR (Nov. 18, 2018), <https://www.npr.org/2018/11/18/669090016/education-secretary-proposes-enhanced-protections-for-those-accused-of-sexual-as> [<https://perma.cc/TSK7-U83X>].

⁸⁵ Elizabeth Bartholet et al., *Rethink Harvard's Sexual Harassment Policy*, BOS. GLOBE (Oct. 15, 2014), <https://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html> [<https://perma.cc/6ZE9-NA77>].

⁸⁶ We believe it is important to note that their statement did not express concern with the lack of representation afforded to survivors. *See id.*

⁸⁷ *Id.* As we will explain further in section II, *infra*, cross examination may not be a fair process for complaints and may not yield a more truthful outcome as alleged by the professors.

⁸⁸ We also share some of the same concerns raised by the professors about the single-investigator model and fear that a system that does not properly issue checks and balances could yield biased decisions against complainants.

⁸⁹ Emily Yoffe, *The College Rape Overcorrection*, SLATE (Dec. 8, 2014), http://www.slate.com/articles/double_x/doublex/2014/12/college_rape_campus_sexual_assault_is_a_serious_problem_but_the_efforts.html [<https://perma.cc/Z99F-S4CW>].

⁹⁰ *See, e.g.*, Emily Yoffe, *Does Anybody Still Take Both Sexual Assault and Due Process Seriously?*, ATLANTIC (Oct. 13, 2018), <https://www.theatlantic.com/ideas/archive/2018/10/sexual-assault-has-become-partisan-issue/572893/> [<https://perma.cc/P7GP-5DM8>]; Yoffe, *supra* note 10.

⁹¹ Yoffe, *supra* note 89 (“These generally begin as consensual encounters and, often because of alcohol and miscommunication, end up in dispute.”).

⁹² Hartocollis & Capecchi, *supra* note 68 (“In my generation, what these girls are going through was never considered assault. . . It was considered, ‘I was stupid and I got embarrassed.’”).

criminal legal system.⁹³ Bazelon has even called expulsion⁹⁴ the “academic death penalty.”⁹⁵

Groups like FACE and SAVE, as well as their allies, have essentially objected to school policies that differ from the rules governing criminal courts. But campus sexual misconduct proceedings appropriately do not mirror criminal processes. Schools handle all kinds of campus misconduct that may also constitute criminal conduct; respondents’ rights groups’ exceptionalist objection latches onto sexual misconduct as the only inappropriate exercise of school disciplinary discretion. Campus codes of conduct allow schools to adjudicate cases of arson, assault, and theft because, as courts have long recognized, schools have the right to discipline conduct—including conduct constituting a crime—that interferes with the educational environment⁹⁶ or undercuts the institution’s legitimate pedagogical goals.⁹⁷ Further, the possible outcomes of campus sexual misconduct cases and criminal cases are vastly different, explaining the proportionately different procedural protections at play in each. Whereas the most severe outcome of a campus case is expulsion, the deprivation of a property⁹⁸ and a minimal liberty⁹⁹ interest, criminal cases can result in a complete loss of liberty through incarceration. Finally, as outlined in Section I(A), *supra*, schools are legally *required* by Title IX to respond to reports of sexual misconduct. This is because Title IX’s statutory purpose is to restore a survivor’s access to education; in short, it is hard to learn when you are forced to share a classroom with your rapist.

Although “due process” has become the battle cry of the respondents’ rights movement, the content of that battle cry does not match the meaning

⁹³ Lara Bazelon, *How to See Justice Done on Campus Sexual Assault*, POLITICO (Sep 8, 2017), https://www.politico.com/magazine/story/2017/09/08/devos-campus-sexual-assault-how-to-get-it-right-215585?lo=ap_c1/ [<https://perma.cc/MJ5F-52CN>].

⁹⁴ CBS News, *CBSN Originals presents “Speaking Frankly: Title IX”*, YOUTUBE (Nov. 22, 2019), <https://www.youtube.com/watch?v=C32BorARgl0> [<https://perma.cc/KBF8-73PL>].

⁹⁵ We deeply disagree with the idea that expulsion is the academic equivalent of the death penalty. Losing the ability to attend a single school because of a violation of school policy is not comparable to an execution.

⁹⁶ *See, e.g.*, *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986) (finding that the Constitution “does not prevent the school” from barring conduct that “would undermine the school’s basic educational mission”); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969) (invalidating a school’s discipline of conduct without evidence of “interference. . . with the schools’ work or of collision with the rights of other students”).

⁹⁷ *See, e.g.*, *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (holding that schools may constitutionally regulate otherwise protected speech where that regulation is “related to legitimate pedagogical concerns”); *Goss v. Lopez*, 419 U.S. 565, 580 (1975) (“Some modicum of discipline and order is essential if the educational function is to be performed”). These cases involve disciplinary processes circumscribed by due process in just the same way as campus sexual misconduct disciplinary proceedings.

⁹⁸ *See Goss*, 419 U.S. at 577–79.

⁹⁹ *Id.* at 574–75.

of due process¹⁰⁰ as determined by the courts. The command of due process precedent is flexible and balance-oriented. In contrast, the respondents' rights movement has called for baseline procedures that exceed what is legally required under due process as well as policy measures that prioritize respondents' educational interests over those of complainants. This includes the clear and convincing standard of evidence, direct cross examination, and unanimity in decision-making prior to particular sanctions.¹⁰¹ Moreover, for organizations like FACE and SAVE¹⁰² that do not offer any formal policy recommendations, the invocation of the term "due process" comes across as particularly ideological and lacking substance. Closer examination reveals that these groups are often outcome-oriented, characterizing what they believe are incorrect findings of responsibility for their sons as a lack of procedural protections for respondents more broadly. This bait-and-switch undermines the integrity of their process arguments.¹⁰³

Gaining traction with the Trump Administration, this rhetoric and the movement for respondents' rights has led to changes in campus sexual misconduct proceedings and how Title IX is interpreted. After meeting with respondents' rights groups,¹⁰⁴ including FACE and SAVE, Secretary of Education Betsy DeVos rescinded previous guidance on Title IX.¹⁰⁵ Following that rescission, DeVos issued a new proposed rule that prioritized schools and respondents over student survivors, taking the teeth out of Title IX.¹⁰⁶ In response to both the respondents' rights movement and voracious higher ed-

¹⁰⁰ The term due process describes the legal protections someone has the right to ensure they are not unfairly deprived of life, liberty, or property. The procedural protections an individual is due are proportional to the interests at stake. For example, the procedural protections for someone facing jail time may be different than someone who is at risk of losing money, or removal from school.

¹⁰¹ See, e.g., *Spotlight on Due Process 2018*, FIRE (2018), <https://www.thefire.org/resources/spotlight/due-process-reports/due-process-report-2018/> [<https://perma.cc/PEP7-TG9V>].

¹⁰² See FAMILIES ADVOCATING FOR CAMPUS EQUALITY, www.facecampusequality.org [<https://perma.cc/W7P9-JH7J>] (last visited Dec. 14, 2019); SAVE OUR SONS, www.help-saveoursons.com [<https://perma.cc/UDS5-FQ9T>] (last visited Dec. 14, 2019).

¹⁰³ See, e.g., Alice True, *You Raised Your Son Right, But Don't Think He's Safe From Accusers Who Learn To Accuse For Girl Power*, HELP SAVE OUR SONS (Oct. 27, 2019), <https://helpsaveoursons.com/to-moms-and-dads-you-raised-your-son-right-but-dont-think-hes-safe-from-accusers-who-learn-to-accuse-for-girl-power/> [<https://perma.cc/EX88-UWDU>] ("If you want to end false accusations you need to stand up for due process rights for all students.")

¹⁰⁴ See Erin Dooley, et al., *Betsy DeVos' Meetings with 'Men's Rights' Groups Over Campus Sex Assault Policies Spark Controversy*, ABC NEWS (Jul. 14, 2017), <https://abcnews.go.com/Politics/betsy-devos-meetings-mens-rights-groups-sex-assault/story?id=48611688> [<https://perma.cc/8V9P-V8W2>].

¹⁰⁵ See David Futrelle, *Betsy DeVos's Title IX Rollback Is a Victory for Men's-Rights Groups*, THECUT (Sept. 7, 2017), <https://www.thecut.com/2017/09/betsy-devos-title-ix-rollback-a-victory-for-mens-rights.html> [<https://perma.cc/C22V-KNCW>].

¹⁰⁶ See Alanna Vagianos, *Betsy DeVos' New Title IX Guidelines Prioritize Schools Over Sexual Assault Survivors*, HUFFPOST (Nov. 16, 2018), https://www.huffpost.com/entry/betsy-devos-new-title-ix-guidelines-prioritize-schools-over-sexual-assault-survivors_n_5beede5fe4b0510a1f3037cf [<https://perma.cc/X7K7-BEPQ>].

ucation lobbies,¹⁰⁷ the Department proposed severely narrowing the definition of sexual harassment,¹⁰⁸ limiting schools' obligation to respond to sexual violence to include only violence that occurs within university programs or activities,¹⁰⁹ limiting what is considered "actual notice"¹¹⁰ to schools of sexual misconduct, requiring the use of the "clear and convincing standard of evidence" in place of the previously recommended preponderance standard,¹¹¹ and requiring direct cross examination by the parties or their representatives in disciplinary hearings.¹¹²

The movement for respondents' rights has also turned to local and state politics for traction. In 2017, California legislators attempted to codify provisions of the 2011 Dear Colleague Letter, which they believed better protected students' rights,¹¹³ after that guidance was rescinded by Secretary DeVos. Though the bill passed the house and senate, it was vetoed¹¹⁴ by

¹⁰⁷ See Dana Bolger, *Betsy DeVos's New Harassment Rules Protect Schools, Not Students*, N.Y. TIMES (Nov. 27, 2018), <https://www.nytimes.com/2018/11/27/opinion/betsy-devos-title-ix-schools-students.html> [<https://perma.cc/YQA2-635F>].

¹⁰⁸ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61462, 61466 (proposed Nov. 29, 2018) (to be codified as 34 C.F.R. pt. 106).

¹⁰⁹ *Id.*

¹¹⁰ For the Department of Education to enforce Title IX, Congress has required that the Department show the school had notice of the violation. When interpreting this provision, the Supreme Court has stated that "a central purpose of requiring notice of the violation 'to the appropriate person' and an opportunity for voluntary compliance before administrative enforcement proceedings can commence is to avoid diverting education funding from beneficial uses where a recipient was unaware of discrimination in its programs and is willing to institute prompt corrective measures." *Gebser v. Lago Vista Ind. Sch. Dist.*, 524 U.S. 274, 289 (1998).

¹¹¹ Title IX was "patterned after Title VI of the Civil Rights Act of 1964," a parallel civil rights statute that prohibits race discrimination in education. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 694 (1979). The Supreme Court has long made clear that Title IX should be applied with reference to Title VI, noting that "the two statutes use identical language," and the "drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been." *Id.* at 695–96. Title VI litigation relies on a preponderance of the evidence standard, suggesting that an appropriate application of the Title IX statute should also rely on preponderance. See, e.g., *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1407 (11th Cir. 1993) (holding that to establish liability under Title VI's disparate impact scheme, a plaintiff must "[d]emonstrate by a preponderance of the evidence that facially neutral practice has disproportionate adverse effect" on a protected class); *South Camden Citizens in Action v. N.J. Dept. of Environmental Protection*, 145 F.Supp.2d 446, 483 (D.N.J. 2001).

¹¹² Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61462, 61498 (proposed Nov. 29, 2018) (to be codified as 34 C.F.R. pt. 106).

¹¹³ See Hannah-Beth Jackson & Noreen Farrell, *Campuses Need to Protect Students Against Sexual Violence. Here's How California Can Help*, SACRAMENTO BEE (Oct. 5, 2017), <https://www.sacbee.com/opinion/california-forum/article177324971.html> [<https://perma.cc/E4RA-2339>].

¹¹⁴ Governor Brown cited the possibility of disparate impact on students of different races and ethnicities for his reasoning on vetoing the bill. We feel it important to note that less than a year earlier Brown signed legislation requiring mandatory minimums in sexual assault cases despite advocacy from national organizations urging him to oppose it because of the impact on men of color. See Eugene Volokh, *California Gov. Jerry Brown Vetoes Proposal to Codify Federal Regulations on Campus Sexual Harassment*, WASH.

then-Governor Brown after opposition organized by FACE.¹¹⁵ In North Carolina, legislators pushed for a bill that would have required schools in campus sexual misconduct proceedings to use the “clear and convincing” standard of evidence and direct cross examination.¹¹⁶ It also would have severely limited when students who committed sexual assault could be suspended or expelled for their conduct.¹¹⁷ All of this ensued despite the grave potential impact on student survivors.

Some state legislators have even used respondents’ rights groups’ talking points for personal gain. For example, in 2019, two Missouri state legislators filed companion bills in the house and senate that would have chilled reporting and punished student complainants.¹¹⁸ In the name of due process, the bill package would have created a specific cause of action allowing respondents in sexual misconduct cases to sue student complainants for “appropriate relief,” including but not limited to actual and punitive damages, if the complaint was found to be unsubstantiated.¹¹⁹ Further, the bill package would have required universities to use a definition of harassment limiting schools’ obligation to act to only when the sexual misconduct *completely* denied, rather than denied or limited,¹²⁰ a student’s access to education.¹²¹ That means students would have been forced to endure repeated and escalat-

Post (Oct. 16, 2017), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/10/16/california-gov-jerry-brown-vetoes-proposal-to-codify-federal-regulations-on-campus-sexual-harassment/> [<https://perma.cc/3CBN-XSFF>].

¹¹⁵ Tyler Kingkade, *California’s Attempt To Reject Betsy DeVos’s Campus Rape Policies Just Failed*, BUZZFEED NEWS (Oct. 16, 2017), <https://www.buzzfeednews.com/article/tylerkingkade/californias-governor-vetoed-a-bill-obama-title-ix> [<https://perma.cc/N69S-Q268>].

¹¹⁶ Martha Quillan, *Students at UNC Schools Accused of Sexual Assault Would Get New Protection Under New Law*, NEWS & OBSERVER (Mar. 8, 2019), <https://www.newsobserver.com/news/politics-government/article227326134.html> [<https://perma.cc/NYE9-AYSR>].

¹¹⁷ *Id.*

¹¹⁸ *Stop the Attack on Survivors’ Rights in Missouri*, KNOW YOUR IX (last accessed Feb. 29, 2020), <https://www.knowyourix.org/hb573/> [<https://perma.cc/FTH6-R8TE>]. See also S.B. 259, 100th Gen. Assemb., Reg. Sess. (Mo. 2019), <https://www.senate.mo.gov/19info/pdf-bill/intro/SB259.pdf> [<https://perma.cc/8QF8-6YDC>]; H.B. 573, 100th Gen. Assemb., Reg. Sess. (Mo. 2019), <https://house.mo.gov/billtracking/bills191/hlrbillspdf/0202H.01I.pdf> [<https://perma.cc/QW4X-GKT2>].

¹¹⁹ See S.B. 259, 100th Gen. Assemb., Reg. Sess. (Mo. 2019), <https://www.senate.mo.gov/19info/pdf-bill/intro/SB259.pdf> [<https://perma.cc/8QF8-6YDC>]; H.B. 573, 100th Gen. Assemb., Reg. Sess. (Mo. 2019), <https://house.mo.gov/billtracking/bills191/hlrbillspdf/0202H.01I.pdf> [<https://perma.cc/QW4X-GKT2>].

¹²⁰ See 2011 Dear Colleague Letter, *supra* note 37 (discussing how sexual violence is a form of sex discrimination prohibited by Title IX), *rescinded by* Dear Colleague Letter from Candice Jackson, Asst. Sec’y, Off. for Civil Rights, U.S. Dep’t Educ. 1–2 (Sep. 22, 2017) [hereinafter 2017 Dear Colleague Letter], <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf> [<https://perma.cc/8DQ4-BZYZ>].

¹²¹ *Compare id.* (explaining that harassing conduct creates a hostile environment if the conduct is sufficiently serious that it interferes with *or limits* a student’s ability to participate in or benefit from a school’s educational program or activities) *with* 2017 Q&A, *supra* note 9, at 1 (providing that harassing conduct creates a hostile environment only when it is so severe, persistent, or pervasive as to deny or limit a student’s ability to participate in or benefit from the school’s programs or activities).

ing levels of abuse, resulting in total school pushout, before they could ask their schools for help.

The Missouri bills would also have barred universities from using discretion in determining what evidence could be considered in a case, opening the door for the misuse of sexual history, mental health history, or sexuality as evidence disputing the allegations.¹²² Finally, the bills ensured that if a respondent felt they were denied due process, they could request a special “due process hearing” with the state’s administrative hearing commission asking to have the university’s decision overturned.¹²³ Representative Dohrman, one of the bill sponsors who called Title IX investigations “medieval,”¹²⁴ claimed his bill did not “plow new constitutional ground, it simply re-state[d] protections which every American expects and deserves.”¹²⁵ The bill may not have plowed constitutional ground (because Rep. Dohrman does not have that power), but it did try to provide respondents with special rights, far beyond what is legally required, based on the outdated myth that women lie about rape.¹²⁶

The bill gained traction in the state and garnered the support of national respondents’ rights groups—until the true intention of the legislation was uncovered.¹²⁷ The lobbyist Richard McIntosh, backed by the dark money group Kingdom Principles,¹²⁸ had been working directly with lawmakers to pass

¹²² See S.B. 259, 100th Gen. Assemb., Reg. Sess. (Mo. 2019), <https://www.senate.mo.gov/19info/pdf-bill/intro/SB259.pdf> [<https://perma.cc/8QF8-6YDC>]; H.B. 573, 100th Gen. Assemb., Reg. Sess. (Mo. 2019), <https://house.mo.gov/billtracking/bills191/hlrbills/pdf/0202H.01I.pdf> [<https://perma.cc/QW4X-GKT2>].

¹²³ *Id.*

¹²⁴ Rep. Dean Dohrman, *Opinion: Title IX Investigations are Medieval in Their Lack of Due Process*, Mo. TIMES (Jan. 23, 2019), <https://themissouritimes.com/56881/opinion-title-ix-investigations-are-medieval-in-their-lack-of-due-process/> [<https://perma.cc/5SL5-3D3N>].

¹²⁵ *Id.*

¹²⁶ See generally Kathryn R. Klement et al., *Accusers Lie and Other Myths: Rape Myth Acceptance Predicts Judgments Made About Accusers and Accused Perpetrators in a Rape Case*, SEX ROLES 81, 16–33 (2019), <https://link.springer.com/article/10.1007/s11199-018-0950-4#citeas> [<https://perma.cc/BZY7-PTS5>] (exploring the ways in which police officers and jurors alike rely on rape myths to justify their disbelief of sexual assault victims).

¹²⁷ Summer Ballentine, *Missouri lobbyist for Title IX changes wanted to use ‘rape equals regret’ as strategy*, KAN. CITY STAR (May 2, 2019), <https://www.kansascity.com/news/politics-government/article229960069.html> [<https://perma.cc/HK62-HZNC>] (showing that a lobbyist supporting the bill, Richard McIntosh, suggested to senators that taking a “couple of shots at the rape equals regret [narrative] wouldn’t hurt” and sent links to men’s rights websites that insisted it is “unsatisfying sexual unions caused by regret—not rape—that is the real sex problem on campus.”).

¹²⁸ Edward McKinley, *Lobbyist’s Crusade to Change Title IX in Missouri Stems from His Son’s Expulsion*, KAN. CITY STAR (Apr. 23, 2019), <https://www.kansascity.com/news/politics-government/article228733614.html> [<https://perma.cc/X73Y-6GGE>] (“Shortly after his son was expelled, McIntosh started a dark money group called Kingdom Principles dedicated to changing Title IX. The group has spent an unknown amount of money underwriting a group that is polling and buying ad time. Kingdom Principles is also bankrolling 29 lobbyists in the Capitol to push the bills—an unusual show of muscle for a single issue even in a state Capitol overrun with lobbyists.”).

the bills—not out of general concern for respondents’ due process rights but out of concern for his son, who had recently been expelled from Washington University for sexual misconduct.¹²⁹ Had the legislation passed, the lobbyist’s son would have been able to immediately appeal his sanction to the administrative hearing commission—where his mother was the presiding and managing commissioner.¹³⁰

“After power dad McIntosh’s son was kicked out, he didn’t try to grease hands at the university. . . . Instead, he began lobbying to change the law for every college and university in the state. He started a dark money group called Kingdom Principles Inc. dedicated to gutting Title IX protections for those who report sexual misconduct and assault. He got St. Louis billionaire David Steward to help fund his mission. In another made-for-TV-twist Steward is on the Board of Trustees for Washington University. The dark money group bought polling, ad time and hired 29 lobbyists, some of whom passionately framed the agenda as a way to protect the civil liberties of black men.”¹³¹

For some student respondents and their family members, then, due process is not actually about constitutional rights; it is about enshrining their right to education regardless of whether they rape other students.

As journalist and respondents’ rights advocate Emily Yoffee noted, “young men found responsible for sexual misconduct on campus have in-

¹²⁹ *Id.* (“After his son was accused and subsequently expelled from Washington University in St. Louis last year through the school’s Title IX process, a leading Jefferson City lobbyist launched a campaign to change the law for every campus in the state.”).

¹³⁰ *Id.*

¹³¹ Aisha Sultan, *How to Beat the Rap in a Title IX Investigation*, ST. LOUIS POST-DISPATCH (Apr. 24, 2019), https://www.stltoday.com/lifestyles/parenting/aisha-sultan/sultan-how-to-beat-the-rap-in-a-title-ix/article_247f155e-b892-55f7-a9dd-87f28915d0a0.html [<https://perma.cc/AQ9Q-DPBH>]. Survivors’ and respondents’ advocates alike have raised concerns with the possibility that students of color, specifically Black men, may be more likely to be disciplined for sexual misconduct as opposed to their white peers. These concerns come from the long history of racial bias in the criminal legal system, particularly the use of false accusations of rape as a means of terrorizing Black men—especially in the Deep South. As Antuan Johnson articulates, the arguments that Title IX is disproportionality harming Black men often lack an intersectional understanding:

While the critique appears plausible on the surface, a closer examination reveals a damning gender bias. There is a history of race being used as a political tool to shut down conversations about sexual assault, even when it directly affects black women. For these critics, it is as if the question of race settles the question of gender. But race does not work alone; race can be used either to illuminate or to obscure the reality of sexual assault for women of color. Despite their apparent concern for racial minorities, many critics of the new Title IX enforcement fall prey to the latter. Without considering the implications their arguments have for women of color, they contend that the prevalence of racial bias is a reason to halt progress on Title IX reform.

Antuan Johnson, *Title IX Narratives, Intersectionality, and Male-Biased Conceptions of Racism*, 9 GEO. J. L. & MOD. CRITICAL RACE PERSP. 57, 59 (2017).

creasingly turned to the courts, filing civil suits against their schools, claiming they were unjustly punished, and their educations ruined. More than 500 such civil suits have been filed.¹³² Groups like FIRE¹³³ and Title IX for All¹³⁴ have even launched projects to monitor the rush of lawsuits filed by respondents. The respondents' rights movement has alleged, without putting forth evidence, that Title IX and administrative enforcement has tipped the scales in favor of survivors who have come forward as complainants.¹³⁵ But respondents' strategy of leveraging due process cases, combined with courts' failure to consider the balance of rights at stake in such cases holistically, has in fact removed survivors from the scales of fairness entirely.

II. LEAVING SURVIVORS OFF THE SCALES

Under the Fourteenth Amendment due process clause, students at public schools and universities have a constitutional guarantee against the deprivation of their right to an education "without due process of law."¹³⁶ It has long been established that courts assessing whether due process in this context has been satisfied should approach the question with a commitment to minimalism and balance.¹³⁷ In this section, we will discuss the analytical framework for due process cases brought by student respondents complaining of procedural defaults in campus sexual misconduct cases. We will begin with the seminal case in school discipline, *Goss v. Lopez*,¹³⁸ and then explore *Mathews v. Eldridge*,¹³⁹ where an identical Court outlined how additional process requirements should be assessed, according to a three-pronged test, when greater deprivations are on the table. There, we will discuss how the *Mathews* Court developed and applied this analysis in the context of two-party disputes, where only the charging institution and the charged student had interests directly at stake. However, in most campus discrimination, harassment, and violence cases—and thus in sexual misconduct cases—there is an additional set of interests: those of the complaining student. Despite this fact, courts have continued to graft the two-party origin *Mathews* framework, unchanged, directly onto three-party campus sexual misconduct proceedings. Finally, after outlining the very real interests that complainants

¹³² Yoffe, *supra* note 10.

¹³³ See *Due Process Litigation Tracker*, FIRE <https://www.thefire.org/category/due-process-litigation-tracker> [<https://perma.cc/LZQ2-QZPL>].

¹³⁴ See *Title IX Legal Database*, TITLE IX FOR ALL <http://www.titleixforall.com/title-ix-legal-database/> [<https://perma.cc/L3Z2-Z8NX>].

¹³⁵ See Section II, *infra*.

¹³⁶ See U.S. CONST. amend. XIV; see *Goss v. Lopez*, 419 U.S. 565, 572–74 (1975).

¹³⁷ See generally *Mathews v. Eldridge*, 424 U.S. 319 (1976) (explaining that determining what constitutes due process depends on the relative weight of each of the three interest factors in a given scenario); *Goss*, 419 U.S. at 579 (noting that "the nature of the hearing will depend on appropriate accommodation of the competing interests involved.").

¹³⁸ 419 U.S. 565.

¹³⁹ 424 U.S. 319.

have at stake in these cases, we will conduct a close analysis of two appellate cases, *Doe v. Baum*¹⁴⁰ and *Haidak v. Univ. of Massachusetts*,¹⁴¹ to demonstrate how courts have missed the opportunity to account for complainants' interests in the due process calculus.

A. *The Supreme Court Bedrock*

The Court established the constitutional floor for due process in school disciplinary proceedings in *Goss* in 1975. After being suspended without a prior or subsequent hearing, nine Ohio high school students sued seeking a declaration that the Ohio statute permitting their suspension without a hearing of any kind violated their constitutional right to procedural due process under the Fourteenth Amendment.¹⁴² The Court found that the suspension of a student from public school may constitute a deprivation of property and liberty interests such that the Fourteenth Amendment due process clause applies.¹⁴³ Given these established interests, the Court ruled that the due process clause affords students the fundamental minimum requirements of oral or written notice and a hearing prior to sanctioning, save exigent circumstances,¹⁴⁴ in the case of an up-to-ten-day suspension.

The *Goss* Court construed these requirements broadly as mandating notice and a hearing of "some kind."¹⁴⁵ To suffice, the hearing must afford the respondent the opportunity to review "statements in support of the charge" and to "make statements in defense or mitigation."¹⁴⁶ The Court identified the purpose of these requirements as twofold: 1) to preserve the transparency of the process¹⁴⁷ and 2) to offer the respondent the opportunity to contextualize the alleged conduct as they see fit.¹⁴⁸ Ultimately, this serves to "provide a meaningful hedge against erroneous action" limiting or depriving a student of access to education.¹⁴⁹ This hedge is critical, as it is constitutionally required, but courts' latitude to define the meaningfulness of that hedge is no-

¹⁴⁰ *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018).

¹⁴¹ *Haidak v. Univ. of Massachusetts*, 933 F.3d 56 (1st Cir. 2019).

¹⁴² *See Goss*, 419 U.S. at 567.

¹⁴³ *See Goss*, 419 U.S. at 574 ("Among other things, the State is constrained to recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause").

¹⁴⁴ *See id.* at 572, 582–83 (affirming lower court's determination that controlling case law permits the "immediate removal of a student whose conduct disrupts the academic atmosphere of the school, endangers fellow students, teachers or school officials, or damages property," so long as a "rudimentary hearing. . . follow[s] as soon as practicable).

¹⁴⁵ *Id.* at 579.

¹⁴⁶ *Id.* at 572.

¹⁴⁷ *See id.* at 580 ("[F]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights . . . Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness") (quoting *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 170, 172–73 (1951)).

¹⁴⁸ *See id.* at 584 ("[T]he student will at least have the opportunity to characterize his conduct and put it in what he deems the proper context.").

¹⁴⁹ *Id.* at 583–84.

ticeably constrained: they are charged simply with ensuring that school disciplinary procedures avoid causing unfair, mistaken, or arbitrary exclusion from education.¹⁵⁰ Given that arbitrariness is a highly deferential standard,¹⁵¹ this principle signals the *Goss* Court's judicial commitment to preserving flexibility and autonomy for schools beyond the constitutional minimum.

Importantly, *Goss*'s holding was fact-bound to a suspension of ten days or fewer,¹⁵² leaving open the prospect that "[l]onger suspensions or expulsions. . . may require more formal procedures."¹⁵³ *Goss* suggests that in especially difficult cases, schools "may. . . summon the accuser, permit cross examination, and allow the student to present [their] own witnesses."¹⁵⁴ The Court's deliberate use of permissive rather than prescriptive language comports with the opinion's attitude of minimalism and leaves space to account for the balance of interests at stake. To that end, the *Goss* Court deliberately declined to overextend itself beyond this constitutional floor and into the realm of legislating school disciplinary procedures.¹⁵⁵ Further, in a prophylactic call to steer clear of prescribing the ins and outs of school disciplinary proceedings, the *Goss* Court cautioned lower courts to exercise "restraint" and avoid "[j]udicial interposition in the operation of the public school system."¹⁵⁶ Only in *Mathews*, one year later, did the Court outline the factors to consider in weighing the need for increased processes in cases where a respondent faces a deprivation greater than a ten day suspension.¹⁵⁷

In *Mathews*, respondent Eldridge had been receiving disability benefits pursuant to Title II of the Social Security Act for four years because of a medical condition when he received a questionnaire from the monitoring agency reassessing his health.¹⁵⁸ Eldridge filled out and returned the ques-

¹⁵⁰ *Id.* at 579.

¹⁵¹ For example, "arbitrary and capricious" review is the most deferential standard of review in administrative law. *See* *Yamaha Corp. of Am. v. State Bd. of Equalization*, 960 P.2d 1031, 1041 (Cal. 1998) (Mosk, J., concurring) (identifying "arbitrary and capricious" as the most deferential standard of review in administrative law).

¹⁵² *Goss*, 419 U.S. at 584.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *See id.* at 583.

¹⁵⁶ *Id.* at 578 (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)).

¹⁵⁷ "More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976) (citing *Goldberg v. Kelly*, 397 U.S. 254, 263–71 (1970)). In *Goldberg*, the Court considered a claimant's due process challenge to the termination of his public benefits without a prior hearing and held that a hearing was generally required prior to the termination of public benefits in which the respondent had a protected interest. *Id.*

¹⁵⁸ *Mathews*, 424 U.S. at 323.

tionnaire to the agency, which then issued a tentative determination that Eldridge was no longer eligible for benefits.¹⁵⁹ The letter informed Eldridge of his right to submit a written response to this determination, which he did, but the agency affirmed its prior decision and the Social Security Administration terminated his benefits.¹⁶⁰ Eldridge filed suit alleging he had been deprived of his protected interest in disability benefits without due process of law.¹⁶¹

The *Mathews* Court ultimately ruled against Eldridge, finding the process provided to him constitutionally sound.¹⁶² In assessing this, the Court enumerated the factors to be considered in the procedural due process analysis to which *Goss* had nodded. Determining the process due to a respondent prior to their deprivation of a constitutionally protected interest requires balancing the *Mathews* factors:

- (1) the private interest at stake (hereinafter the first *Mathews* factor);
- (2) the risk of an erroneous deprivation with the present procedures, discounted by the probable value of additional procedural safeguards (hereinafter the second *Mathews* factor); and
- (3) the public interest, including [but not limited to] the fiscal and administrative burdens additional procedures would entail (hereinafter the third *Mathews* factor).¹⁶³

The first *Mathews* factor describes the stakes for the party facing an affirmative deprivation by state action. In campus sexual misconduct disciplinary proceedings, this is the student respondent, who has been named as an abuser. The second factor accounts for the comparison between the risk of erroneous deprivation to that respondent using the status quo procedures and the gravity of that same risk where additional procedures are provided. The third factor is broad-sweeping: it counterbalances the first two by accounting for the public interest at stake. This includes the costs to the charging institution of implementing the procedures requested beyond the status quo. But it is decidedly broader, encompassing also the interests of those in whose wellbeing the institution has a stake as well as broader societal goals.¹⁶⁴ This flexible test¹⁶⁵ locates fairness in balance; the deliberately broad language of the third factor renders the test applicable to analyses with

¹⁵⁹ *Id.* at 323–24.

¹⁶⁰ *Id.* at 324.

¹⁶¹ *Id.* at 323–24.

¹⁶² *Id.* at 349.

¹⁶³ *Id.* at 335, 347.

¹⁶⁴ *See id.* at 347 (“the public interest. . . includes the administrative burden and other societal costs”); *see also* *Lassiter v. Dep’t Soc. Servs.*, 452 U.S. 18, 27–28 (1981) (emphasizing that the state is concerned not only with ensuring “the termination decision. . . be made as economically as possible” but also with preserving “the welfare of the child”).

¹⁶⁵ *See, e.g.,* *United States v. Raddatz*, 447 U.S. 667, 677 (1980) (“In *Mathews v. Eldridge*. . . we emphasized that three factors should be considered in determining whether the flexible concepts of due process have been satisfied”).

more competing interests at stake than the disability benefits case, remaining faithful to the principle of balance.

Although *Goss* outlines the procedures necessary for students prior to an up-to-ten-day suspension, courts looking for guidance in different circumstances have turned to the *Mathews* framework. Under this framework, due process requires at least notice and the opportunity to be heard, plus any additional procedures as determined by the balance of *Mathews* interests at stake in a given scenario. In essence, while the *Goss* analysis stands for minimalism and institutional deference beyond the constitutional floor, *Mathews* stands for holistic balancing. This framework guides courts exploring the uncharted waters where punishment greater than a ten-day suspension is at stake in determining what additional procedures the constitutional floor might require.

B. *Opportunities for Inclusion: Universities and the Mathews Analysis*

All discrimination and violence cases, including sexual misconduct cases, share a salient element that distinguishes them from the underlying fact patterns of *Goss* and *Mathews*: the existence of a complainant apart from the charging institution. Whereas both *Goss* and *Mathews* were concerned with balancing the respondent's interests against the public's interest, which included only the government or its proxy,¹⁶⁶ sexual misconduct cases present an opportunity for the third factor to account also for the interests of the complainant. Despite this critical distinction, however, courts have grafted the *Mathews* two-party analysis directly onto sexual misconduct cases, accounting for respondents and institutions and all but erasing complainants. This incongruence yields potentially inaccurate due process analyses. Recall the three *Mathews* factors:

- (1) the private interest at stake;
- (2) the risk of an erroneous deprivation with the present procedures, and the probable value of additional or substitute procedural safeguards; and
- (3) the public interest, including the fiscal and administrative burdens additional or substitute procedures would entail.¹⁶⁷

The first two factors focus squarely on the respondent, as the government contemplates taking some of that respondent's rights away. The third factor, however, considers the interests of the public at large. This factor is the elastic one, leaving space for the court as arbiter to fold in all other relevant interests.¹⁶⁸ In a typical campus sexual misconduct case,¹⁶⁹ at least one person has complained that the respondent subjected them to miscon-

¹⁶⁶ See generally *Mathews*, 424 U.S. 319 (balancing private interests against the Government's interest); *Goss v. Lopez*, 419 U.S. 565, 579–80 (1975) (balancing the interests of students against the interests of Ohio's public-school system).

¹⁶⁷ *Mathews*, 424 U.S. at 335.

¹⁶⁸ See *Lassiter*, 452 U.S. at 27 (considering the state's "urgent interest in the welfare of the child," a non-party whose interests are implicated, under the *Mathews* analysis);

duct. This means that two students, whose accounts of the conduct at hand often conflict, both have a formal relationship to the university and similar interests in maintaining that relationship. The university is also charged with making a determination against one party and in favor of the other. The calculus of fairness in these and other discrimination or violence cases, then, is of the same family as, but slightly differentiated from, *Goss* and *Mathews*, where the court merely weighed the institution's interests against those of the party faced with the possibility of a deprivation.

The third *Mathews* factor plainly encapsulates the government or its proxy's interests—here, the university's. Schools have an interest in honoring their statutory and constitutional obligations to their students under the Constitution and statutory law as well as in cost effectiveness and efficiency, which the third *Mathews* factor specifically names. But schools also have broader policy interests at stake as well, namely: resolving cases efficiently, maintaining campus and community safety, administering a disciplinary process with integrity, achieving accurate outcomes, preserving a focus on educational attainment, and complying fully with legal obligations. Each of these university interests under the third *Mathews* factor necessarily implicates complainants as well.

Courts assessing due process should consider the universities' interests as they implicate complainants under the third prong of their analysis. Since complainants bring cases of this kind when their educational environment has been compromised by sex discrimination, efficiency in assessing for conduct violations and administering discipline is critical to remedy the possible discrimination. A university's interest in campus and community safety rests on community members' perceptions of safety; where a student must coexist with their perpetrator, this goal is severely undermined. It is further undermined where complainants—or respondents, for that matter—feel the process to which their case was subjected lacks fairness. Perceptions of bias not only decrease feelings of safety but also undermine institutional legitimacy.

Universities' interests in accuracy in outcomes and the inextricably intertwined interest in maintaining a focus on educational goals also plainly concern complainants, who are, first and foremost, students. In this vein, courts routinely acknowledge respondents' student status, regularly asserting that erroneous findings of responsibility unfairly deprive respondents of access to education at their university.¹⁷⁰ Although this is theoretically accurate, it fails to account for the other side of the same coin: erroneous findings

Mathews, 424 U.S. at 347 (“the public interest. . . includes the administrative burden and other societal costs”).

¹⁶⁹ Here, we refer to student-on-student misconduct, though Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681 (1972) (hereinafter Title IX), requires schools to respond to acts of sexual misconduct committed both by and against non-students in certain circumstances.

¹⁷⁰ See, e.g., *Doe v. Baum*, 903 F.3d 575, 582 (6th Cir. 2018).

of *no* responsibility similarly inhibit complainants' access to education at their university, implicating the third *Mathews* factor. Finally, because schools receiving federal funding are bound by Title IX's prohibition on sex discrimination in education, the university's interest in complying with this federal law involves ensuring survivors do not experience violence or further discrimination in the wake of violence, including throughout the investigation process. The university's interests assessed under the third *Mathews* prong, then, should encompass the interests of complainants.

C. *Opportunities for Inclusion: Complainants' Distinct Interests*

But the third *Mathews* prong is not restricted to the university's interests, nor is it restricted to analyzing the complainant's interests as filtered through their relationship to the university. Distinct from the many ways in which universities' interests dovetail with those of complainants, complainants also have their own significant interests on the line that fall under the third *Mathews* factor as an ascertainable element of the broader public interest. These interests stand alone, related to but not subsumed by those of the university. Courts routinely highlight respondents' stake in continued access to education, the integrity of their reputation, and their future educational, professional, and financial outcomes. But an erroneous finding against a complainant also has profound and enduring consequences. To achieve truly balanced processes through analyses, deciding courts should account for complainants' interests in the realms of education, reputation, and future prospects under the third *Mathews* factor. We consider each in turn.

i. *Continued Access to Education*

All student parties to sexual misconduct disciplinary proceedings have a primary interest in avoiding unfair exclusion from school.¹⁷¹ Under Title IX, complainants look to their school for assistance through the disciplinary process when their experience of gender-based discrimination or violence limits or denies them access to education.¹⁷² Erroneous findings of no respondent responsibility, the issuance of inappropriate sanctions,¹⁷³ and

¹⁷¹ See Title IX, (emphasizing access to educational benefits and programs); see also Goss, 419 U.S. at 579.

¹⁷² See 2001 SEXUAL HARASSMENT GUIDANCE, *supra* note 9, at 2 (“Sexual harassment of a student [that] den[ies] or limit[s], on the basis of sex, the student’s ability to participate in or to receive benefits, services, or opportunities in the school’s program. . . is, therefore, a form of sex discrimination prohibited by Title IX”).

¹⁷³ We use the term “inappropriate” here to refer to sanctions that fail to realize Title IX’s promise of restoring access to education. This would encompass, for example, a situation where a student found responsible for assault is required to write a research paper or complete community service hours but remains in a survivor’s class, prohibiting the survivor from being able to attend that class. This would not necessarily, however, encompass a situation where a respondent is suspended until after the survivor graduates rather than expelled entirely.

stalled or abandoned investigation processes may thus unfairly deprive complainants of their interest in continued access to education.

Survivors overwhelmingly experience academic hardships. Students sexually assaulted during college routinely see drops in their GPAs following their assault.¹⁷⁴ In fact, some evidence suggests that a rape during the first semester of college might more than double a survivor's risk of having a GPA below 2.5 in the next semester.¹⁷⁵ This kind of academic downturn might force them to change majors or transfer schools. Moreover, survivors go to great lengths to avoid their perpetrators, skipping shared classes, avoiding libraries or dining halls, and withdrawing from campus life.¹⁷⁶ Thus, those who do not receive the support they need from their schools may delay their education or barely get by, resulting in what advocates have dubbed "constructive expulsion," wherein institutional apathy leaves survivors little chance at succeeding in school.¹⁷⁷ Indeed, approximately one-third of survivors are pushed out of school by some combination of these factors in the wake of violence.¹⁷⁸

As if the direct educational impacts of experiencing violence are not enough, the institutional betrayal many survivors face when seeking support from their schools only exacerbates those impacts.¹⁷⁹ When schools fail to respond adequately to reports of sexual violence—dismissing or ignoring survivors' complaints, subjecting them to harmful investigative procedures, or failing to yield meaningful outcomes—survivors' trauma symptoms worsen, interfering even more substantially with their educations.¹⁸⁰ The interpersonal betrayal of sexual violence and the institutional betrayal of a university's inadequate response thus operate in a vicious cycle, mutually compounding the negative effects on the survivor.¹⁸¹

Denying complainants access to an investigation or a hearing altogether gravely impacts academic success. Take, for example, Wagatwe Wanjuki, who was raped and abused by her boyfriend while a student at Tufts Univer-

¹⁷⁴ Carol E. Jordan et al., *An Exploration of Sexual Victimization and Academic Performance Among College Women*, 15 *TRAUMA, VIOLENCE, AND ABUSE* 191, 195–96 (2014).

¹⁷⁵ *Id.* at 196.

¹⁷⁶ See Rebecca Marie Loya, *Economic Consequences of Sexual Violence For Survivors: Implications For Social Policy And Social Change*, 96 (2012) (unpublished Ph.D. dissertation, Brandeis University) (on file with KNOW YOUR IX).

¹⁷⁷ Lila MacLellan, *We're Just Starting to Grasp How Campus Rape Steals Women's Careers Before They Start*, *QUARTZ AT WORK* (July 28, 2018) <https://qz.com/work/1334192/the-story-of-a-campus-rape-shows-how-womens-careers-can-get-hurt-before-they-start/> [<https://perma.cc/Y79F-3ZYS>].

¹⁷⁸ Mengo & Black, *supra* note 21, at 243.

¹⁷⁹ Carly Parnitzke Smith & Jennifer J. Freyd, *Institutional Betrayal*, 69 *AM. PSYCHOLOGIST* 575, 578–83 (2014).

¹⁸⁰ *See id.*

¹⁸¹ Cf. Deborah Epstein & Lisa Goodman, *Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences*, 167 *U. PA. L. REV.* 399, 447 (2019).

sity.¹⁸² She faced excruciating trauma symptoms in the wake of the violence, and despite her report to the school, Tufts insisted it had no obligation to respond.¹⁸³ Wanjuki was left on her own to cope with the violence, the trauma in its wake, and the disruption of doing so while sharing a campus with her perpetrator.¹⁸⁴ The ordeal completely derailed her education; as a result of her plummeting grades in the wake of her trauma and a lack of support from the school, she was expelled from Tufts.¹⁸⁵ She finally earned a college degree from a different university in 2014, ten years after she first enrolled at Tufts.¹⁸⁶

Granting complainants access to processes ill-suited for complaints of sexual violence similarly risks impairing their access to education.¹⁸⁷ In 2014, a junior undergraduate at a Midwestern university was threatened and physically and sexually assaulted by a senior student she considered a close friend.¹⁸⁸ Though mediation should not have been an option under federal guidance,¹⁸⁹ the university offered it, and the perpetrator's friend reached out to the survivor—in violation of the no-contact order—and convinced her that mediation, which took the possibility of a determination of responsibility off the table, was the best choice.¹⁹⁰ During the mediation, the perpetrator did not dispute the allegations against him.¹⁹¹ At the conclusion of the session, he was sanctioned: directed to seek counseling and abstain from drug and alcohol use.¹⁹² The mediator then told the survivor that based on the facts, mediation should have never been an option.¹⁹³ The survivor saw the respondent intoxicated at a party that same night.¹⁹⁴

The survivor dropped out of her extracurriculars, isolated herself in her room, and had trouble keeping up with academics, even contemplating a leave of absence; her perpetrator walked around campus seemingly unscathed. Looking for support, she disclosed her experience to a friend six

¹⁸² Dana Bolger, *Gender-Based Violence Costs: Schools' Financial Obligations Under Title IX*, 125 *YALE L. J.* 2106, 2108 (2016).

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ Some have argued that schools are ill-equipped to handle cases of sexual violence and that they should instead be handled by the police. It is important to note that schools handle all sorts of campus conduct violations that could also be criminal behavior, such as simple assaults, arson, and theft. But rarely is adjudication of those criminal behaviors met with hostility from the public. Further, not only are schools legally required to respond to sexual violence, they can provide survivors with specific protections that ensure they are able to continue their education.

¹⁸⁸ Interview with Anonymous (Dec. 2018).

¹⁸⁹ 2011 Dear Colleague Letter, *supra* note 37, at 21 ("In some cases, such as alleged sexual assaults, mediation will not be appropriate even on a voluntary basis.).

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

months later, and that friend responded with her own disclosure—about the very same man. She, too, had dropped many of her extracurriculars, struggled with coursework, and withdrawn from a class to cope with her trauma. Because of the university's inappropriate offer of mediation and issuance of disproportionately mild sanctions, both the complainant in that case and this second survivor—among others—experienced continuing discrimination that compromised their educations.

Even when a complainant receives a hearing, an ineffective hearing can lead to the same sort of institutional betrayal, compounding the adverse academic effects of violence. In a sexual misconduct case at the University of Kentucky, the school mishandled the disciplinary proceedings three times over, leading the survivor, Jane Doe, to lose access to education entirely.¹⁹⁵ In October of 2014, Jane Doe reported that she had been raped in her dorm room by a peer.¹⁹⁶ She dropped out of her classes and withdrew from campus housing while her case was pending.¹⁹⁷ After the first hearing, Jane Doe's respondent was found responsible for sexual misconduct, and Jane Doe enrolled in courses on a different campus to continue her education.¹⁹⁸ But the respondent appealed, and because of procedural errors, the university granted a new hearing.¹⁹⁹ The respondent was found responsible again after the second hearing, again alleged procedural violations, and again was granted a new hearing.²⁰⁰ After receiving notice that she would have to endure a third hearing, Jane Doe withdrew from classes entirely, citing the emotional trauma of the rehearings.²⁰¹ That hearing, too, was found to have procedural flaws,²⁰² and in a fourth hearing, the respondent was cleared.

The actual procedures used in disciplinary proceedings directly implicate educational access as well. Respondents alleging their universities violated their due process rights in sexual misconduct disciplinary proceedings frequently push for the ability to cross examine—either directly or through

¹⁹⁵ See *Doe v. Univ. of Kentucky*, No. 5:15-CV-00296-JMH, 2016 WL 4578328, at *1–2 (E.D. KY. Aug. 31, 2016) (“Plaintiff had begun classes in the spring semester at a different BCTC campus but the notice of a third hearing caused Jane Doe’s mental health to deteriorate further and was so time consuming that she withdrew from classes again on March 12, 2015”) (internal citations omitted).

¹⁹⁶ *Id.* at *1.

¹⁹⁷ *Doe v. Univ. of Kentucky*, 357 F. Supp. 3d 620, 622 (E.D. KY. 2019) (“On October 15, 2014, Plaintiff dropped out of her classes at BCTC and withdrew from UK’s campus housing”).

¹⁹⁸ *Id.*

¹⁹⁹ See *Doe*, No. 5:15-CV-00296-JMH, 2016 WL 4578328, at *1 (E.D. KY. Aug. 31, 2016) (“Student B appealed the decision of the hearing panel to the University Appeals Board (the ‘UAB’). The UAB issued a written ruling on December 4, 2014, finding violations of Student B’s due process rights by the hearing panel and setting aside the hearing panel’s decision.”).

²⁰⁰ *Id.* at *1.

²⁰¹ *Id.* at *1 (E.D. Ky. Aug. 31, 2016) (“Plaintiff had begun classes in the spring semester at a different BCTC campus but the notice of a third hearing caused Jane Doe’s mental health to deteriorate further and was so time consuming that she withdrew from classes again on March 12, 2015”) (internal citations omitted).

²⁰² *Id.* at *2.

their representative—the complainant in the case.²⁰³ Some courts have recently touched on the implications of such procedures for complainants: the Sixth Circuit Court of Appeals, for example, has twice acknowledged that direct cross examination by a respondent could subject a survivor to further harassment.²⁰⁴ This comports with anecdotal experience. As one survivor from Washington explained:

If I could have been cross-examined by a representative of my assailant, I would not have reported my case. Period. It would not have been worth it. I would anticipate that process to be so traumatizing that I would have [had] a total mental-health break down and le[ft] school. I would have just stayed silent. There's no way I would have subjected myself to that.²⁰⁵

In 2017, the Sixth Circuit reasoned that adversarial cross examination may “pose unique challenges given a victim’s potential reluctance to interact with” the respondent, concluding as a result that the university could balance this concern against the respondent’s due process rights by providing for cross examination through the submission of possible questions to the university panel.²⁰⁶ The court believed it had struck a balance between the competing rights, still acknowledging that even this workaround “may not relieve [the complainant’s] potential emotional trauma” entirely.²⁰⁷ Recently, however, in a decision that grossly minimized student-complainants’ interests, the Sixth Circuit backpedaled on its prior reasoning. In *Baum*, that same court again recognized the risk of harm in direct cross examination but concluded, divergent from *Cincinnati*, that allowing the respondent’s repre-

²⁰³ See, e.g., *Haidak v. Univ. of Massachusetts*, 933 F.3d 56, 66 (1st Cir. 2019) (“Haidak claims that the hearing was nevertheless constitutionally flawed. . . [because] he was not allowed to cross-examine Gibney”); *Doe v. Baum*, 903 F.3d 575, 581 (6th Cir. 2018) (“[Respondent] claims that because the university’s decision ultimately turned on a credibility determination, the school was required to give him a hearing with an opportunity to cross-examine [complainant] and other adverse witnesses”); *Plummer v. Univ. of Houston*, 860 F.3d 767, 775 (5th Cir. 2017), *as rev’d* (June 26, 2017) (noting that plaintiffs asserted “they were denied. . . the opportunity to effectively cross-examine adverse witnesses”); *Doe v. Cummins*, 662 F.App’x 437, 442 (6th Cir. 2016) (observing that student found responsible for sexual misconduct below alleged due process violations on the grounds that he “was not permitted to effectively cross-examine adverse witnesses”).

²⁰⁴ See *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 403 (6th Cir. 2017) (quoting *Doe v. Regents of the Univ. of Cal.*, 5 Cal.App.5th 1055, 1085 (2016) (“‘Allowing an alleged perpetrator to question an alleged victim directly may be traumatic or intimidating, thereby possibly escalating or perpetuating’ the same hostile environment Title IX charges universities with eliminating”). See *Baum*, 903 F.3d at 583 (“Universities have a legitimate interest in avoiding procedures that may subject an alleged victim to further harm or harassment.”).

²⁰⁵ Know Your IX Comment, *supra* note 62.

²⁰⁶ *Univ. of Cincinnati*, 872 F.3d at 406. While the Court ultimately concluded that the respondent’s Due Process rights were violated, this part of the Court’s opinion shows that courts have considered survivors’ interests in their *Mathews* analysis.

²⁰⁷ *Id.* at 404.

sentative to cross examine the complainant was the appropriate solution.²⁰⁸ The close analysis below of Sixth Circuit case law highlights how the exclusion of complainants' interests from the *Mathews* analysis directly and significantly impacts determinations of procedural fairness.

ii. *Reputation*

Complainants, like respondents, also have reputational interests related to sexual misconduct cases, and in fact the societal deck in that realm is disproportionately stacked against complainants from the start. Because women are the gender that most commonly reports experiencing violence on campus,²⁰⁹ we discuss here the dual reputational harms of stacking stereotypes of women atop stereotypes of survivors. Both face extensive discrediting regardless of the soundness of their narratives, leading to increased obstacles in help-seeking and the heightened risk of reputational harm for disclosing even provably truthful allegations.

Society's baseline disbelief of women, which scholars have dubbed the "credibility discount"—"an unwarranted failure to credit an assertion where this failure stems from prejudice"²¹⁰—fuses with narratives about the motives behind allegations of sexual violence to tarnish the reputations of those who come forward about their experiences. In one study, 22% of college men agreed that women use allegations of sexual violence "to get back at men," and 13% agreed that "a lot of women lead men on and then cry rape."²¹¹ In fact, one of the most prevalent rape myths that studies have uncovered is the simple but insidious belief that "[s]he lied."²¹² Respondents and their supporters capitalize on this slanted social narrative by propelling forward the trope that women cry rape in retribution. In that vein, Save Our Sons founder Alice True says she believes revenge is the primary driver of what she characterizes as "false accusations" by women in particular: "[b]ased on the large number of emails I receive, I . . . sense that false accusations are common among ex-girlfriends for various reasons, but usually out of revenge or jealous[y]."²¹³

One common iteration of the retributive narrative is the idea that women claim violence after having sex they regret. Candace E. Jackson, for-

²⁰⁸ *Baum*, 903 F.3d at 583.

²⁰⁹ *Statistics About Sexual Violence*, NAT'L SEXUAL VIOLENCE RESOURCE CTR. (2015), https://www.nsvrc.org/sites/default/files/publications_nsvrc_factsheet_media_packet_statistics-about-sexual-violence_0.pdf [<http://perma.cc/D6YD-8HD5>].

²¹⁰ Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PA. L. REV. 1, 3 (2017).

²¹¹ Katie Edwards et al., *Rape Myths: History, Individual and Institutional-Level Presence, and Implications for Change*, 65 SEX ROLES 761, 767 (2011).

²¹² Sarah McMahon, *Rape Myth Beliefs and Bystander Attitudes Among Incoming College Students*, 59 J. OF AM. C. HEALTH 3, 4 (2010).

²¹³ Lilly Dancyger, *Inside the Organizations That Support Accused Campus Rapists*, GLAMOUR MAG. (July 14, 2017), <https://www.glamour.com/story/organizations-support-accused-campus-rapists> [<http://perma.cc/FJ9R-JRXJ>].

merly the acting Assistant Secretary for Civil Rights in the Trump Administration's Department of Education, condoned this narrative in a 2017 interview with the *New York Times*: "Rather, the accusations—90 percent of them—fall into the category of 'we were both drunk,' 'we broke up, and six months later I found myself under a Title IX investigation because she just decided that our last sleeping together was not quite right.'" ²¹⁴

After considerable public backlash, Jackson apologized. ²¹⁵ But the momentary validation of this narrative from a top civil rights official charged with protecting the rights of campus survivors is a harm that cannot be undone, as it reified a trite but insidious narrative that women deliberately conflate regrettable sex and rape. As former Know Your IX Policy Organizer Alyssa Peterson shared, "I've had sex I've regretted, and I've been raped. I know the difference." ²¹⁶

Thus, survivors find themselves subject to a self-referential narrative of malicious intent through retributive accusations: they are inherently untrustworthy, so their allegations must be vengeful, and because the allegations are vengeful, the survivors become untrustworthy. This narrative takes aim directly at survivors' reputations; even provable truthfulness cannot interrupt the cycle. Despite the fact that false reports of rape hover around the same percentages as false reports of other crimes, survivors are branded as liars in their communities and often face backlash for "false" reporting to an extent unmatched by most other crime victims. ²¹⁷

Kamilah Willingham and her friend were assaulted by Willingham's classmate while she was a student at Harvard Law School. ²¹⁸ Though the original school hearing panel found her respondent responsible, a group of Harvard law professors revoked that decision—then publicly tried to discredit Willingham. She was untrustworthy, they argued, because "there [were not] even any charges that he used force," ²¹⁹ an age-old rape myth the revival of which cast the elite institution into momentary disrepute. In her raw public reply, Willingham wrote: "You—my former professors—have joined together to silence and discredit my story of sexual assault and its institutional mishandling." ²²⁰ Willingham explained that she didn't know "which [was] worse: not being believed or being believed but being valued

²¹⁴ Erica L. Green and Sheryl Gay Stolberg, *Campus Rape Policies Get a New Look as the Accused Get DeVos's Ear*, *N.Y. TIMES* (July 12, 2017), https://www.nytimes.com/2017/07/12/us/politics/campus-rape-betsy-devos-title-iv-education-trump-candice-jackson.html?smid=tw-nytimes&smtyp=cur&_r=0 [<https://perma.cc/F656-H2U3>].

²¹⁵ Sarah Brown, *Ed. Dept. Official Apologizes For '90%' Remark on Campus Rape. What's the Research?*, *CHRON. HIGHER EDUC.* (July 12, 2017), <https://www.chronicle.com/article/Ed-Dept-Official-Apologizes/240634> [<https://perma.cc/XL4Q-VFZ7>].

²¹⁶ Interview with Alyssa Peterson, Policy Organizer, Know Your IX (Aug. 27, 2017).

²¹⁷ See, e.g., *A FALSE REPORT* (Netflix 2019).

²¹⁸ Kamilah Willingham, *To the Harvard Law 19: Do Better*, *MEDIUM* (March 24, 2016), <https://medium.com/@kamily/to-the-harvard-law-19-do-better-1353794288f2> [<https://perma.cc/8923-V9PV>].

²¹⁹ *Id.*

²²⁰ *Id.*

so little it doesn't matter."²²¹ Regardless of whether they move forward with their complaint, and regardless of whether their case yields a finding of responsibility, then, campus complainants in sexual misconduct cases face immense reputational harms.

Just as courts have asserted that universities have an interest in protecting respondents' reputations from undue damage, universities have this interest across the board, including in avoiding the improper debasement of complainants' reputations. This means that under the third *Mathews* factor, courts should consider the risk of perpetuating rape-mythical narratives of retributive women who falsely "cry rape" in the same way they consider the risk of undue reputational harm to a respondent. This myth-mongering to discredit complainants and the resulting reputational harm have very real impacts on the public at large. As Willingham put it:

I am tired of being treated as if I don't matter. I am hurt by how much more easily you believe a man when he says 'she's lying' than a woman when she says 'he sexually assaulted me, and I deserve better'. . . . But, most importantly, I am not alone. . . . I'm just one of many survivors in our community whose very real pain you will have to reckon with.²²²

iii. *Professional and Financial Prospects*

These academic and reputational effects reverberate into survivors' careers but have gone unacknowledged by the courts. Although the courts have weighed the fact that a student who is found to have committed sexual misconduct "may be forced to withdraw from his classes and move out of his university housing. . . [and] could face difficulty obtaining educational and employment opportunities down the road,"²²³ survivors have received little institutional acknowledgement for the same struggles—despite the fact that evidence of the negative impacts of a report of sexual misconduct on student respondents pales in comparison to that documenting the barriers survivors face in the wake of violence.²²⁴ Student survivors frequently drop out of school, take time off, or transfer institutions in the wake of violence.²²⁵ They may have to change their majors or their career path as a result.²²⁶ Those who do obtain a degree still face difficulty in obtaining employment, whether due

²²¹ *Id.*

²²² *Id.*

²²³ *Doe v. Baum*, 903 F.3d 575, 582 (6th Cir. 2018).

²²⁴ *See e.g.*, *Mengo & Black*, *supra* note 21, at 244 ("The dropout rate for students who had been sexually victimized (34.1%) was higher than the overall university dropout rates (29.8%)").

²²⁵ *Id.* at 242–45.

²²⁶ *See, e.g.*, Anonymous story on file with Authors ("After being sexually assaulted my Sophomore year by three men in my department I ended up transferring majors to avoid seeing them every day. I couldn't go to class, even the ones I didn't share directly with them, because it was almost entirely impossible to enter the department building

to a spotty academic record, publicity around their assault,²²⁷ or the persistent nature of trauma symptoms.²²⁸ All of these factors contribute to survivors' decreased earning capacities and increased susceptibility to financial fragility later in life.²²⁹ So long as courts consider these impacts on respondents under the *Mathews* analysis, so too should they factor them into their analyses of complainants' interests at stake in sexual misconduct proceedings.

Dropping out of college severely limits a survivor's employment opportunities; even if they do complete their degree, the academic impact is still salient, often forcing a change of career paths or reducing options for graduate or professional school. One Know Your IX activist studied music on a departmental scholarship at the University of Delaware and was forced to transfer majors or else remain in the same small program with her rapist.²³⁰ Another Know Your IX activist declined her admission offer from her top choice law school after finding out her abuser was matriculating there.²³¹ These are just two instances of the career-altering impacts gender violence can have on student survivors.²³²

Adverse educational experiences can directly implicate survivors' financial wellbeing. When a survivor's academic performance declines, they may lose scholarships,²³³ take semesters of leave,²³⁴ drop out,²³⁵ or even be removed from school like Wanjuki.²³⁶ Each of these may result in the in-

without seeing my rapists. This meant I lost thousands of dollars in class credits and completely changed my career path halfway through college.”)

²²⁷ Alyssa Leader & Sarah Nesbitt, *As Campus Sexual Assault Survivors, We Call on DeVos to Do Better*, VICE (Sept. 11, 2018), https://www.vice.com/en_us/article/8x79kx/betsy-devos-title-ix-sexual-assault-on-campus. [<https://perma.cc/B6R4-C89Q>].

²²⁸ See, e.g., Rachel Kimerling et al., *Unemployment Among Women: Examining the Relationship of Physical and Psychological Intimate Partner Violence and Posttraumatic Stress Disorder*, J. OF INTERPERSONAL VIOLENCE 450, 451–452 (2009).

²²⁹ See Ross Macmillan, *Adolescent Victimization and Income Deficits in Adulthood: Rethinking the Costs of Criminal Violence from a Life-Course Perspective*, 38 CRIMINOLOGY 553, 570 (2000), summarized in NAT'L SEXUAL VIOLENCE RESOURCE CTR. (2013), https://www.nsvrc.org/sites/default/files/publications_nsvrc_research-brief_sexual-violence-workplace.pdf [<https://perma.cc/3HM3-PYMY>].

²³⁰ Sage Carson, *I Was Raped at College. Here's How DeVos's New Rules Harm Survivors Like Me*, VICE (Nov. 16, 2018), https://www.vice.com/en_us/article/d3b7gq/title-ix-betsy-devos-college-rape-sexual-assault [<https://perma.cc/M6LP-S3NW>].

²³¹ Leader & Nesbitt, *supra* note 227.

²³² See, e.g., Sharyn Potter et al., *Long-term impacts of college sexual assaults on women survivors' educational and career attainments*, 66 J. OF AM. C. HEALTH 496 (2018) (listing impacts on survivors' college experience, job market experience, and health as found in a study).

²³³ Tyler Kingkade, *Being A Sexual Assault Survivor in College Often Comes With Huge Bills*, HUFFPOST (Jan. 13, 2016), https://www.huffpost.com/entry/cost-of-sexual-assault-in-college_n_5695c0e7e4b09dbb4bad3f4c [<https://perma.cc/GN2H-F6CE0>].

²³⁴ *Id.*

²³⁵ Audrey Chu, *Op-Ed: I Too Left Tufts — in 2015*, TUFTS DAILY (Oct. 9, 2018), <https://tuftsdaily.com/opinion/2018/10/09/op-ed-left-tufts-2015/> [<https://perma.cc/89UW-9TTR>].

²³⁶ Bolger, *supra* note 182, at 2108.

creased accrual of student loan debt,²³⁷ which weighs down even young people who graduate as planned and secure gainful employment without having to cope with trauma symptoms. A survivor named Mila explained that because of her assault, she found herself buried in an additional \$43,960 worth of academic costs.²³⁸ Another survivor reported that she took time off and transferred after her assault. The increased living expenses, scholarship loss, additional tuition, and decreased work capacity drained her of approximately \$100,000.²³⁹ Therefore, on top of trauma, survivors must also contend with significant financial loss.

In addition to the obvious impact depressed grades have on employment prospects, student survivors who publicly share their stories face reputational barriers to securing or maintaining employment. These barriers, combined with student loan debt accrued during leaves of absence or through transfers, project a future of financial instability for survivors of sexual violence. Harvard survivor Alyssa Leader, for example, has written about how she was demoted at work and declined for multiple jobs because of the publicity around her assault.²⁴⁰ Even once employed, survivors still see reductions in earning capacity; those who have experienced sexual assault are estimated to earn on average \$6,000 less per year than their peers who have not been assaulted.²⁴¹ The unfortunate correlation between sexual violence and income loss is particularly concerning when it comes to adolescent experiences of violence, which negatively impact educational and occupational attainment.²⁴² Once again, institutional betrayal compounds this adverse impact.²⁴³

²³⁷ See *id.* See also Alexandra Brodsky, *How Much Does Sexual Assault Cost Students Every Year*, WASHINGTON POST (Nov. 18, 2014), <https://www.washingtonpost.com/posteverything/wp/2014/11/18/how-much-does-sexual-assault-cost-college-students-every-year/> [https://perma.cc/Q5EM-NK6K] (“When a school denies survivor the services and support they need to recover, students may be forced to take out additional loans—or even to leave school, a semester’s tuition down the drain.”). See also Congresswoman Jackie Speier, Letter from Congresswoman Speier to Secretary Catherine Lhamon 3 (Sep 13, 2016), <https://www.knowyourix.org/wp-content/uploads/2017/01/9-13-16-Speier-Letter-to-OCR-re-Sexual-Assault-Student-Loan-Debt.pdf> [https://perma.cc/CZT4-Z7J6] (“The effects of sexual violence on an individual can manifest themselves in many ways, some of which can lead to financial injuries. These financial injuries can range from out-of-pocket expenses (like medical payments) to the lost value of educational services already paid for (when a survivor cannot benefit from classes). Loan interest accrued is another type of financial injury that could result from sexual violence.”).

²³⁸ Hatch, *supra* note 18.

²³⁹ Bolger, *supra* note 182, at 2117.

²⁴⁰ See Leader & Nesbitt, *supra* note 227; Christine Hauser, *Former Student Sues Harvard Over Handling of Sexual Crimes Complaints*, N.Y. TIMES (Feb. 19, 2016), <https://www.nytimes.com/2016/02/20/us/harvard-sexual-crimes-complaints-alyssa-leader.html> [https://perma.cc/6YTY-ZMEJ].

²⁴¹ See Macmillan, *supra* note 229, at 2.

²⁴² See *id.*

²⁴³ See Smith & Freyd, *supra* note 179, at 576 (describing how institutional betrayal worsens psychological trauma).

These adverse professional and financial impacts on survivors of sexual violence highlight the need for holistic considerations of the student interests at stake in campus sexual misconduct disciplinary proceedings. Indeed, in a country where at least two men credibly accused of sexual misconduct²⁴⁴ have been confirmed to the highest court in the land²⁴⁵ where they now earn hefty paychecks²⁴⁶ while writing potentially tide-shifting legal opinions, courts' tendency to recognize the educational and professional prospects of respondents but not complainants is unsurprising.

D. Prevailing Applications of Mathews

Since the decisions in *Goss* and *Mathews* nearly forty-five years ago, courts across the country have built on this precedent, exploring the due process rights of respondents in campus disciplinary hearings where a greater-than-ten-day suspension is on the table.²⁴⁷ As a result of the respondents' rights movement's backlash against survivors' activism, discussed in Section I, *supra*, the courts have been flooded with such complaints.²⁴⁸ Because this is previously uncharted territory, courts' decisions have a profound impact on institutional policies and the future of educational equity. As such, all parties have a vested interest in a fair application of the *Mathews* factors.

Recent appellate decisions, however, have failed to fully acknowledge the distinct ways in which disciplinary proceedings like those for campus sexual misconduct implicate the third *Mathews* factor. Two cases in particular, *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018), and *Haidak v. Univ. of Massachusetts-Amherst*, 933 F.3d 56 (1st Cir. 2019), took on the *Mathews* analysis within months of each other. The decisions of *Baum* and *Haidak* exemplify recent approaches to the *Mathews* analysis that fall into the trap of erasing complainants to different extents. In *Baum*, the court focused heavily

²⁴⁴ Mikayla Bouchard & Marisa Schwartz Taylor, *Flashback: The Anita Hill Hearings Compared to Today*, N.Y. TIMES (Sept. 27, 2018), <https://www.nytimes.com/2018/09/27/us/politics/anita-hill-kavanaugh-hearings.html> [<https://perma.cc/8UC6-9NN7>].

²⁴⁵ See Sheryl Gay Stolberg, *Kavanaugh Is Sworn In After Close Confirmation Vote in Senate*, N.Y. TIMES (Oct. 6, 2018), <https://www.nytimes.com/2018/10/06/us/politics/brett-kavanaugh-supreme-court.html> [<https://perma.cc/3U9D-5CFM>]; R.W. Apple, Jr., *The Thomas Confirmation; Senate Confirms Thomas, 52-48, Ending Week Of Bitter Battle; 'Time For Healing,' Judge Says*, N.Y. TIMES (Oct. 16, 1991), <https://www.nytimes.com/1991/10/16/us/thomas-confirmation-senate-confirms-thomas-52-48-ending-week-bitter-battle-time.html> [<https://perma.cc/869C-5LBN>].

²⁴⁶ See *Judicial Compensation*, U.S. COURTS (last updated 2019), <https://www.uscourts.gov/judges-judgeships/judicial-compensation> [<https://perma.cc/JS34-GLWG>].

²⁴⁷ See, e.g., *Doe v. Purdue U.*, 928 F.3d 652, 663 (7th Cir. 2019) (“[I]n the disciplinary context, the process due depends on a number of factors, including the severity of the consequence and the level of education.”).

²⁴⁸ See Samantha Harris & K.C. Johnson, *Campus Courts in Court: The Rise in Judicial Involvement in Campus Sexual Misconduct Adjudications*, 22 N.Y.U. J. LEGIS & PUB. POL'Y 49 (2019) (analyzing the recent wave of litigation by college sexual assault victims).

on the first *Mathews* factor, the private interest at stake, nodding toward the second factor but hardly acknowledging the third.²⁴⁹ This left both the University's broader interests and the complainant's individual interests almost completely unaddressed.

In *Haidak*, on the other hand, the court's more holistic analysis hinged primarily on the second *Mathews* factor: the risk of erroneous deprivation.²⁵⁰ This opinion sufficiently explored the first factor and gave greater nuance to the third factor in terms of identifying the University's interests but still largely omitted those of the complainant. Though *Haidak* succeeded more than *Baum*, both cases problematically shirk the crucial interests of the complainant that should be considered under the third *Mathews* factor. This analytical error can lead to substantial miscalculations that threaten the future of fairness in campus disciplinary proceedings. To comport with *Mathews*' command to balance all the interests at stake, courts should fully account for universities' and complainants' countervailing interests when assessing a respondent's due process claim.²⁵¹

Doe v. Baum

According to the *Baum* court's opinion, University of Michigan freshman Jane Roe and junior John Doe met, intoxicated, at a fraternity party.²⁵² Witnesses for each party provided conflicting assessments of how intoxicated Roe and Doe each were.²⁵³ The two disappeared to Doe's room, where Doe alleges they engaged in consensual sex and Roe asserts she was raped, fading in and out of consciousness as Doe assaulted her.²⁵⁴ Toward the end of the night, Roe vomited into a trash can next to Doe's bed, and at some point Doe left the room.²⁵⁵ A bystander with no prior connection to either Doe or Roe found Roe "crying and 'very drunk' in Doe's bed."²⁵⁶ Later that night, sobbing on the floor of her dorm room, Roe told two friends she thought she had been raped.²⁵⁷

Roe filed a Title IX complaint with the university, and the investigator²⁵⁸ initially concluded that "the evidence supporting a finding of sexual

²⁴⁹ See *Doe v. Baum*, 903 F.3d 575, 582 (6th Cir. 2018).

²⁵⁰ See *Haidak v. Univ. of Massachusetts*, 933 F.3d 56, 69 (1st Cir. 2019) ("As a general rule, we disagree, primarily because we doubt that student-conducted cross-examination would so increase the probative value of hearings and decrease the 'risk of erroneous deprivation'" (internal citations omitted).

²⁵¹ See *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) ("Resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the *governmental and private interests* that are affected") (emphasis added).

²⁵² *Baum*, 903 F.3d at 578–79.

²⁵³ *Id.* at 579–80.

²⁵⁴ *Id.* at 579.

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.* at 580.

²⁵⁸ The *Baum* opinion's precedential value is constrained from the outset because the Sixth Circuit's reasoning is fact-bound use of the single investigator model in the underlying campus disciplinary process. This model involves a single investigator who is

misconduct was not more convincing than the evidence offered in opposition to it,” though he did note that the student who found Roe crying in Doe’s bed might have been a more credible witness, because she did not have connections to either party or to their respective Greek organizations. The investigator determined, however, that the witness was unable to speak to the relevant question of whether Roe had been intoxicated during the encounter, since she found Roe after the encounter had ended.”²⁵⁹ Roe appealed, arguing the investigator’s findings were not supported by the evidence, and the University’s Appeals Board reversed the determination below on the same underlying facts and evidence, finding Doe responsible.²⁶⁰ Understanding he might face expulsion, Doe withdrew from the University.²⁶¹

Doe filed a lawsuit against the University in federal court claiming the campus disciplinary proceeding to which he was subjected violated his rights under the Due Process Clause and under Title IX.²⁶² The district court granted the University’s motion to dismiss in full, and Doe appealed.²⁶³ The Sixth Circuit Court of Appeals ultimately reversed, holding that “if a public university has to choose between competing narratives to resolve a case, the university must give the accused student or his agent an opportunity to cross examine the accuser and adverse witnesses in the presence of a neutral factfinder.”²⁶⁴ Because credibility was at issue here, and because neither the ac-

charged with interviewing both parties, examining the evidence, and recommending a finding of whether the respondent is responsible. RRGs and civil rights groups like Know Your IX alike, however, acknowledge this model’s potential for procedural deficiencies. See *Proposed Title IX Regulations: A Single Investigator is Not Enough*, FIRE (Jul. 25, 2019), <https://www.thefire.org/proposed-title-ix-regulations-a-single-investigator-is-not-enough/> [<https://perma.cc/2BWZ-BS4Z>] (“A single investigator model is a deeply problematic and flawed system”). See also *Advice from Parents*, FACE, <https://www.face-campusequality.org/advice-from-parents> [<https://perma.cc/8DMC-QYZR>] (calling the single investigator model “a very problematic process”); Alyssa Peterson & Sejal Singh, *State Policy Playbook*, KNOW YOUR IX (2017), https://actionnetwork.org/user_files/user_files/000/016/520/original/Know_Your_IX_State_Policy_Playbook.pdf [<https://perma.cc/3NUN-C59W>] (highlighting as a best practice having “findings of responsibility or non-responsibility for an incident of gender-based violence determined by a panel of three to five (3-5) impartial and regularly and thoroughly trained decision makers using a preponderance of the evidence standard”); Know Your IX et al., Letter to University Presidents on Fair Process, KNOW YOUR IX (Apr. 15, 2015), <https://www.knowyourix.org/letter-university-presidents-fair-process/> [<https://perma.cc/7LTF-EKAC>] (emphasizing “[t]he right to be heard by neutral decision-makers”). Given the growing suspicion of the single investigator model, its use in the campus disciplinary proceeding at issue limits the precedential value of *Baum*. This is because in the holistic analysis of the process due, the addition of one procedural protection may counteract the need for another. We posit that when schools use more procedurally sound methods than the single investigator model, other procedural safeguards may become inert. As such, this case is fact-bound by the investigative model used.

²⁵⁹ *Baum*, 903 F.3d at 580.

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.* at 576.

²⁶⁴ *Id.* at 578.

cused student nor his agent had the opportunity to cross examine Roe, the court found Doe's due process claim sufficiently plausible to survive a motion to dismiss.²⁶⁵

On the whole, the *Baum* opinion focused its analysis on the potential deprivations the respondent faced and his risk of erroneous deprivation.²⁶⁶ The opinion obliquely mentioned the administrative and financial costs the University might face²⁶⁷ but altogether disposed of the third *Mathews* factor beyond those costs. Further, the opinion mentioned the complainant in the case only in reference to the rights of the respondent, failing to identify how her interests dovetailed with those of the University.²⁶⁸ In sum, then, the *Baum* analysis positioned the due process question as a balance between the private interests at stake and the University's financial and administrative burdens, an imbalanced approach that erased the complainant from the scales and therefore may have yielded an unreliable outcome.

The court clearly laid out Doe's interests under the first *Mathews* factor, explaining that as a result of a finding of responsibility, "[t]he student may be forced to withdraw from his classes and move out of his university housing. His personal relationships might suffer. And he could face difficulty obtaining educational and employment opportunities down the road, especially if he is expelled."²⁶⁹ The court explained that "[b]eing labeled a sex offender by a university has both an immediate and lasting impact on a student's life."²⁷⁰ (Universities do not, in fact, maintain sex offender registries or a functional equivalent, nor do we believe they should). The Court also acknowledged Doe's ultimate decision to withdraw from school after a find-

²⁶⁵ *Id.* at 581–82.

²⁶⁶ *See, e.g., id.* at 582 ("Doe never received an opportunity to cross-examine Roe or her witnesses—not before the investigator, and not before the Board. As a result, there is a significant risk that the university erroneously deprived Doe of his protected interests.").

²⁶⁷ *See id.* at 582 ("Providing Doe a hearing with the opportunity for cross examination would have cost the university very little").

²⁶⁸ *See, e.g., id.* at 582 ("And, importantly the university identifies no substantial burden that would be imposed on it if it were required to provide an opportunity for cross examination in this context.").

²⁶⁹ *Id.* at 582 (citations omitted).

²⁷⁰ *Id.* (citing *Doe v. Miami Univ.*, 882 F.3d 579, 600 (6th Cir. 2018)). As here, with the allusion to the criminal sex offender registry, the *Baum* opinion repeatedly invoked rhetoric rooted in the criminal legal system, ignoring controlling case law's clear admonishment against doing so as well as the civil nature of Title IX. *See, e.g., Doe v. Miami Univ.*, 882 F.3d at 600 (6th Cir. 2018) ("But the protections afforded to an accused, even in the face of a sexual-assault accusation, 'need not reach the same level . . . that would be present in a criminal prosecution.'"); *Doe v. Univ. of Cincinnati*, 872 F.3d at 400 (citations omitted) (asserting that campus sexual misconduct "hearing[s] need not 'take on . . . [the] formalities' of a criminal trial"); *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 635 (6th Cir. 2005) (" . . .disciplinary hearings against students and faculty are not criminal trials, and therefore need not take on many of those formalities"). Given that defendants charged criminally by the state have the right to greater due process protections consistent with the scope of the rights at stake, this comparison is inapposite and bolsters the lopsidedness of the *Baum* opinion's analysis.

ing of responsibility, adding that he was just “13.5 credits short of graduating.”²⁷¹

With Doe’s private interests established, the court proceeded to the second *Mathews* prong. It remarked that because “Doe never received an opportunity to [orally] cross examine Roe or her witnesses . . . there is a significant risk that the university erroneously deprived Doe of his protected interests.”²⁷² “Without the back-and-forth of adversarial questioning,” the court determined, Doe could not “test [Roe’s] memory, intelligence, or potential ulterior motives.”²⁷³ Given that intelligence generally has little to do with the truthfulness of allegations of sexual misconduct,²⁷⁴ this analysis seemed to shift the focus from Doe’s risk of *erroneous* deprivation to simply his risk of deprivation, undermining the integrity of the *Mathews* analysis. Nevertheless, the court located the value of cross examination in the fact that it allows the fact-finder to assess the witness’s demeanor and gives the respondent an opportunity to elevate inconsistencies in the allegations.²⁷⁵ This clearly established Doe’s stakes and his risk of erroneous deprivation of those stakes under the *Mathews* analysis.

In a hollow gesture toward the third *Mathews* factor, the court then focused narrowly on the minimal costs the University would have faced in allowing Doe to directly cross-examine Roe. Because “the university already provide[d] for a hearing with cross examination in all [other] misconduct cases,”²⁷⁶ the court determined that the cost of providing such a procedure in sexual misconduct cases was minimal,²⁷⁷ making the University’s decision to deny Doe that opportunity even more troubling. This reasoning is problematic in two ways: first, from this cost analysis that is highly specific to the University of Michigan, the court extrapolated a sweeping

²⁷¹ *Baum*, 903 F.3d at 580. Because Doe’s remaining credits were irrelevant to his responsibility or to the outcome of the case, the Court’s decision to mention this conveys some sense of sympathy.

²⁷² *Id.* at 582.

²⁷³ *Id.*

²⁷⁴ The authors’ sweep of comprehensive online resources yielded no results indicating that intelligence correlates in any manner to the truthfulness of sexual misconduct allegations.

²⁷⁵ *Baum*, 903 F.3d at 581 (“Not only does cross-examination allow the accused to identify inconsistencies in the other side’s story, but it also gives the fact-finder an opportunity to assess a witness’s demeanor and determine who can be trusted.”).

²⁷⁶ *Id.* at 582.

²⁷⁷ *See id.* at 578 (“[I]f a public university has to choose between competing narratives to resolve a case, the university must give the accused student or his agent an opportunity to cross-examine the accuser and adverse witnesses.”). From this fact-specific point, the court leaps to a sweeping conclusion conceivably applying to all universities regardless of the unique costs they might face in implementing such procedures. In addition, then, to mandating particular processes beyond those required by *Goss* in this particular case, the *Baum* court holds this out as a generalized rule of law. *See Goss v. Lopez*, 419 U.S. 565, 582 (1975) (“We hold only that, in being given an opportunity to explain his version of the facts at this discussion, the student first be told what he is accused of doing and what the basis of the accusation is.”). This runs contrary to both the Court’s express commands and the basic principles of *stare decisis*.

conclusion conceivably applying to all universities regardless of the unique costs they might face in implementing such procedures.²⁷⁸ Second and most concerning, this narrow construction of the third *Mathews* factor erased the University's interests in safety and accuracy in its sexual misconduct disciplinary proceedings as well as its investment in the wellbeing and fair treatment of student complainants.²⁷⁹

Universities have an interest in allowing credible complaints of sexual misconduct to proceed and ensuring those processes are fair and accurate. The *Baum* court, however, did not once ascribe these interests to the University or assess the ways in which the requested direct cross examination might inhibit such interests.²⁸⁰ Its failure to do so reduced the complex interlocking interests of the University to a pure cost analysis, ignoring the educational purpose of the institution, its interest in adhering to its legal obligations under Title IX, and its general investment in the fairness and accuracy of its disciplinary proceedings.

Universities and the public also have vested interests in the wellbeing and educational access of student complainants in sexual misconduct disciplinary proceedings; the *Baum* analysis merely paid this idea lip service. The court made one concession in this realm, admitting that because "[u]niversities have a legitimate interest in avoiding procedures that may subject an alleged victim to further harm or harassment," the respondent does not always have "a right to personally confront his accuser and other witnesses."²⁸¹ Instead, the *Baum* court suggested, "the university could allow the accused student's agent to conduct cross examination on his behalf."²⁸² With only Doe's interests in mind, this reasoning may stand, but careful consideration reveals the ways in which this form of adversarial examination could still retraumatize survivor complainants and deter survivors from coming forward. Despite the fact that a complainant and a respondent's

²⁷⁸ See *Baum*, 903 F.3d at 578. The court has concluded, based merely upon the fact that the University of Michigan would face minimal costs in adding cross examination to sexual misconduct proceedings given that it already provides that procedure in other disciplinary proceedings, that applying the *Mathews* calculus to all schools in the Sixth Circuit would yield this same outcome.

²⁷⁹ Discussed, *supra*, at 32.

²⁸⁰ See generally *Baum*, 903 F.3d 575 (largely omitting Universities' interests in preventing and responding to sexual misconduct from its application of the *Mathews* factors to the requested additional procedure of cross examination).

²⁸¹ *Id.* at 583. Furthermore, in support of its assertion that "a representative aligned with the accused" can conduct effective cross examination while avoiding the potential trauma of direct confrontation by the respondent, the court cites comparatively to *Maryland v. Craig*, 497 U.S. 836 (1990), which discussed the importance of ensuring "'rigorous adversarial testing' through 'full cross-examination'" in a criminal trial. *Baum*, 903 F.3d at 583 (citing *Maryland*, 497 U.S. at 846 (1990)). That case, however, is wholly inapposite: the question presented in *Maryland* revolved around the Sixth Amendment's confrontation clause, the very text of which explicitly limits its application to "criminal prosecutions." U.S. Const. Amend. VI. The *Baum* court offered no other case law directly in support of this point.

²⁸² *Baum*, 903 F.3d at 583.

educational interests are fundamentally equal and that both face the possibility of an erroneous deprivation if wrongly decided against, the court gives inordinate weight to the first and second *Mathews* factors at the expense of the third.

Although cross examination has been touted as “the ‘greatest legal engine ever invented for the discovery of truth,’”²⁸³ social science research calls that proclamation into question. Findings that trauma responses undermine the accuracy of fact-finders’ credibility assessments²⁸⁴ decrease universities’ interests in implementing such a procedure. Individuals with trauma symptoms often have difficulty answering questions fully and thoroughly in real time, as questioning about a traumatic experience may result in flashbacks or dissociation.²⁸⁵ Those who suffer from trauma may have to work against trauma responses to place disorganized and fragmented memories together in real time.²⁸⁶ As a consequence, a witness suffering trauma symptoms may seem less credible to a factfinder simply because they appear unable to immediately recall the details of an assault.

Cross examinations’ inherent shortcomings are further compounded by trauma symptoms. Researchers have found that “a lawyer’s demeanor towards the witness can prejudicially affect an observer’s conclusions about witness deception.”²⁸⁷ For example, when interviewees “are questioned by suspicious interviewers,” such as a respondent’s representative, “subjects tend to view their responses as deceptive even when they are honest, which significantly increases detection errors.”²⁸⁸ This bias arises from two phenomena: (1) the suspicious interrogation itself warps observers’ perceptions, and (2) the interrogation places the interviewee under stress, which then induces behavior likely to be interpreted as deceptive.²⁸⁹ These findings are especially concerning when it comes to complainants with trauma symptoms, as the hostile questioning could exacerbate trauma responses that factfinders misread as indicators of deception. Such possibilities fall within the purview of the public’s, the university’s, and the complainant’s interest in accuracy under the third *Mathews* factor.

²⁸³ *California v. Green*, 399 U.S. 149, 158 (1970).

²⁸⁴ Epstein & Goodman, *supra* note 181, at 421.

²⁸⁵ Chia-Ying Chou et al., *Cardiovascular and psychological responses to voluntary recall of trauma in posttraumatic stress disorder*, 9 EUR. J. PSYCHOTRAUMATOLOGY, 1, 7 (2018) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5990938/> [<https://perma.cc/G78W-8M3F>] (quantifying the frequency of flashbacks and dissociation experienced by study participants during trauma recall).

²⁸⁶ Dr. Rebecca Campbell, Professor of Psychology, Mich. State Univ., Seminar Address for the National Institute of Justice Research for the Real World Series (Dec. 2012), <https://nij.ojp.gov/media/video/24056> [<https://perma.cc/2ZVJ-CXJS>].

²⁸⁷ H. Hunter Bruton, *Cross-Examination, College Sexual Assault Adjudications, and the Opportunity for Tuning Up the “Greatest Legal Engine Ever Invented,”* 27 CORNELL J.L. & PUB. POL’Y 145, 158 (2017).

²⁸⁸ Olin Guy Wellborn III, *Demeanor*, 76 CORNELL L. REV. 1075, 1080 (1990–91).

²⁸⁹ *Id.* at 1080.

Despite recognizing that the Supreme Court “instructs lower courts to consider the parties’ competing interests,” then, the Sixth Circuit did not sufficiently consider how universities’ non-financial interests or complainants’ individual interests might inform the balance of fairness.²⁹⁰ In fact, the complainant, characterized strictly as “the accuser,” was mentioned almost exclusively in reference to the respondent’s rights.²⁹¹ Because of this imbalance, the court’s lopsided language may be construed as affording the special right of direct cross examination only to respondents based strictly on their own interests, defying basic principles of fairness and the balancing command of *Mathews*. Indeed, *Baum*’s explicit holding appears to afford the right of cross examination only to the respondent: “if a public university has to choose between competing narratives to resolve a case, the university must give the *accused student or his agent* an opportunity to cross-examine the accuser and adverse witnesses,”²⁹² because that process “allow[s] *the accused* to identify inconsistencies in witness’s statements.”²⁹³ By the end of *Baum*, then, the due process analysis involves balancing the interest of respondents against the narrowly defined interests of universities; universities’ broader goals and complainants’ interests have been removed from the scales almost entirely.

Haidak v. Univ. of Massachusetts-Amherst

The First Circuit’s opinion in *Haidak* came down in August of 2019, just under a year after the *Baum* decision. James Haidak and Lauren Gibney, both students at the University of Massachusetts-Amherst, were studying abroad in Barcelona when the inciting incident occurred; Gibney charges that Haidak held her down, attempted to strangle her, squeezed her pressure points, and then grabbed her wrists and used her fists to punch himself in the face.²⁹⁴ Haidak, on the other hand, contends that Gibney struck him first and that he merely defended himself.²⁹⁵ Shortly afterwards, Gibney disclosed the incident to her mother, and her mother then reported to the University.²⁹⁶

Pursuant to the student code of conduct, the school provided the respondent, Haidak, with notice of the charges against him and issued a no-contact order.²⁹⁷ Haidak violated the no-contact order almost immediately and repeatedly, was presented a notice of charges for those violations, and

²⁹⁰ *Doe v. Baum*, 903 F.3d 575, 581 (6th Cir. 2018).

²⁹¹ *See, e.g., id.* at 578 (“[T]he university must give the accused student or his agent an opportunity to cross-examine the accuser and adverse witnesses”), 582 (“In *University of Cincinnati*, we explained that an accused’s ability ‘to draw attention to alleged inconsistencies’ in the accuser’s statements does not render cross-examination futile”), 583 (“That is not to say, however, that the accused student always has a right to *personally* confront his accuser and other witnesses”).

²⁹² *Id.* at 578 (emphasis added).

²⁹³ *Id.* at 581 (emphasis added).

²⁹⁴ *See Haidak v. Univ. of Massachusetts*, 933 F.3d 56, 61 (1st Cir. 2019).

²⁹⁵ *See id.*

²⁹⁶ *Id.*

²⁹⁷ *Id.* at 61–62.

then proceeded to violate the order again.²⁹⁸ Gibney reported this subsequent violation to the school on June 3.²⁹⁹ The University took no official action.³⁰⁰ On June 17, after fourteen days of inaction, the University issued Haidak a corresponding third notice of charges, this time including an immediate suspension order.³⁰¹ On September 1 of that year, still awaiting a full hearing, Haidak withdrew from the University.³⁰²

But Haidak did not leave; he rented an apartment in Amherst and he and Gibney continued seeing one another until two additional violent incidents that month.³⁰³ In the first, an intoxicated Haidak called Gibney for a ride, and after an argument ensued, he “threatened to kill himself and then exited the moving car.”³⁰⁴ Gibney reported it to the police.³⁰⁵ Roughly a week later, Haidak showed up, unwelcome, at Gibney’s place of employment and was ultimately removed by security.³⁰⁶ Gibney reported to the University and filed for a restraining order in state court, which was granted temporarily but which the court declined to extend after a hearing.³⁰⁷

At this point, the University offered Haidak his choice of three hearing dates, and he opted for November 22, a day he “knew that he would not be present . . . and would have to participate by phone.”³⁰⁸ He was notified of the school’s hearing procedures in writing, and he subsequently submitted evidence he wished to be considered.³⁰⁹ Haidak also submitted a list of thirty-six questions for the Hearing Board (“Board”) to consider posing to Gibney, in accordance with the University’s policy of screening pre-submitted questions and allowing the Board to exercise discretion in posing them.³¹⁰ The University declined to admit three of Haidak’s proffered pieces of evidence and refined his list of thirty-six questions to sixteen.³¹¹

During the hearing, the Board “[m]ov[ed] back and forth between Haidak and Gibney . . . ultimately examin[ing] each student three times.”³¹² The Board did not permit direct cross examination by either party or their representatives,³¹³ instead posing Haidak’s submitted questions in similar but not identical language.³¹⁴ Ultimately the Board found Haidak responsible for physical assault and for failure to comply with the no-contact order against

²⁹⁸ *Id.* at 62.

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² *Id.* at 63.

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ *See id.*

³⁰⁷ *Id.* at 63–64.

³⁰⁸ *Id.* at 64.

³⁰⁹ *Id.*

³¹⁰ *Haidak*, 933 F.3d at 64.

³¹¹ *Id.*

³¹² *Id.* at 64, 68.

³¹³ *Id.*

³¹⁴ *Id.*

him.³¹⁵ It found him not responsible for endangering persons or property and harassment, citing evidence revealed during the hearing that much of the communication in violation of the no-contact order was mutual and non-threatening.³¹⁶ Given Haidak's two prior disciplinary violations, the University expelled him, and an administrator upheld the sanction on appeal.³¹⁷ Haidak filed a complaint in federal district court claiming the same violations as those alleged in *Baum*³¹⁸—procedural due process errors and violations of Title IX—as well as an equal protection violation.³¹⁹ The district court entered summary judgment in the University's favor.³²⁰

On appeal, the First Circuit Court of Appeals assessed the due process claims and found that the expulsion hearing was procedurally sound.³²¹ The court found that Haidak received timely and detailed notice of the charges against him; informed him of the procedures to be used; afforded him the right to be present, to hear evidence against him, to respond directly, and to call witnesses; and notified him of his right to an attorney.³²² The court determined that the exclusion of some of his proffered evidence and the University's decision not to allow him to directly cross examine witnesses as in a criminal trial did not render the hearing process constitutionally inadequate.³²³ The court reached this conclusion through a more thorough application of the *Mathews* balancing test than *Baum*,³²⁴ though it still came up short in accounting for complainants' interests under the third factor.³²⁵

The court clearly recognized Haidak's right to a public education as an interest protected by the due process clause.³²⁶ It elaborated that his primary private interest under the first *Mathews* factor was his "paramount" interest in "completing [his] education, as well as avoiding unfair or mistaken exclusion from the educational environment, and the accompanying stigma."³²⁷ Because Haidak faced first an extended suspension³²⁸ and ulti-

³¹⁵ *Id.*

³¹⁶ *See id.*

³¹⁷ *Id.* at 75.

³¹⁸ *Id.* See *Baum*, 903 F.3d at 580.

³¹⁹ *Haidak*, 933 F.3d. at 65. The court affirmed the dismissal of Haidak's Title IX claims. *Id.* at 75.

³²⁰ *Id.* at 60.

³²¹ *Id.* at 71.

³²² *Id.* at 66.

³²³ *See id.* at 66–67.

³²⁴ *Compare id.* at 66 (discussing under the third *Mathews* factor the fact that a school has a legitimate interest "in protecting itself and other students from those whose behavior violates the basic values of the school) with *Baum*, 903 F.3d at 582 (discussing under the third *Mathews* factor only the potential administrative, not safety or values-oriented, costs to the school).

³²⁵ *See id.* at 69–70.

³²⁶ *Id.* at 65 ("[States] must 'recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause.'") (citing *Goss v. Lopez*, 419 U.S. 565, 574 (1975)).

³²⁷ *Haidak*, 933 F.3d at 66 (quoting *Gorman v. Univ. of Rhode Island*, 837 F.2d 7, 14 (1988)).

mately a complete expulsion, those interests had most certainly been implicated.³²⁹

Haidak argued that the University, in denying him the opportunity to directly cross examine the complainant and excluding some of his proffered evidence at his expulsion hearing, denied him due process and was constitutionally flawed.³³⁰ Regarding direct cross examination, the court methodically laid out the deprivation Haidak faced with the procedures provided, the contents of the additional procedures requested, and the likely deprivation that would have resulted from the use of such requested procedures.³³¹ Haidak had been suspended after a hearing using indirect cross examination.³³² His complaint argued an entitlement to direct cross examination, which he suggested would have decreased his risk of erroneous deprivation.³³³ The court confronted this directly by pointing to a lack of evidence to support Haidak's claim: the court said it was "aware of no data proving which form of inquiry produces the more accurate result in the school disciplinary setting."³³⁴ Further, it distinguished this case from *Baum*, explaining that the Sixth Circuit's categorical rule requiring "cross-examination by the accused or his representative in all cases turning on credibility determinations" was unnecessary in the absence of evidence that the circumscribed form of cross examination used in Haidak's underlying case was "so fundamentally flawed as to create a categorically unacceptable risk of erroneous deprivation."³³⁵ This pointed toward minimal weight under the second *Mathews* factor.³³⁶

Regarding the partial exclusion of evidence, the court reasoned that because the information such evidence would have introduced was either re-

³²⁸ See *id.* at 71–72. The court conducted a thorough analysis of the suspension hearing as well. We focus here only on the expulsion hearing, given that the court ultimately finding errors in the suspension hearing did not prejudice the ultimate result of the expulsion hearing.

³²⁹ See *id.* at 66.

³³⁰ *Id.* at 67.

³³¹ See *id.* at 68–71.

³³² Indirect cross examination for the purposes of this article means cross examination in which both parties submit to the school questions to be posed to the other party. The school then prescreens those questions and the hearing panel has discretionary authority to pose those questions to the other party. This system more closely mirrors the inquisitorial model than the American criminal adversarial one. See Jacqueline L. Austin & Margaret Bull Kovera, *Cross-Examination Educates Jurors About Missing Control Groups in Scientific Evidence*, 21 PSYCHOL. PUB. POL'Y & L. 252, 254 (2015) ("In many inquisitorial systems, experts are. . . cross-examined by the judge.").

³³³ See *Haidak*, 933 F.3d at 68–71. ("Haidak urges us to hold that . . . due process demands that the accused be allowed to question opposing witnesses directly whenever a university disciplinary proceeding turns on the witnesses' credibility.").

³³⁴ See *id.* at 68–69 ("[W]e doubt that student-conducted cross-examination would so increase the probative value of hearings and decrease the 'risk of erroneous deprivation' that it is constitutionally required in this setting.") (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

³³⁵ *Id.* at 69.

³³⁶ See *id.*

dundant of other testimony that was included or was outside the scope of the hearing, its exclusion had no discernible impact on Haidak's risk of erroneous deprivation.³³⁷ Haidak first argued the school should have admitted as evidence the transcript of Gibney's state-court restraining order hearing because it exposed the fact that Gibney and Haidak's initial contact in violation of the no-contact order was welcome and reciprocal.³³⁸ The court explained, however, that Gibney "admitted to the Hearing Board the consensual nature of her post-order contact with Haidak," so duplicative evidence would not have increased accuracy.³³⁹ Further, Haidak faced no deprivation with respect to such evidence, as he was acquitted on the harassment charge, rendering his argument moot.³⁴⁰

The second piece of excluded evidence, which Haidak argued violated his due process rights, was a photograph of a bite mark Gibney had allegedly given Haidak.³⁴¹ The court here made comparisons to criminal proceedings in which the burden of proof, the private interests at stake, and due process protections for the accused are the highest of any adjudicatory proceeding.³⁴² It ultimately determined that because even the heightened due process protections of criminal trials do not require admission of this kind of evidence, such an exclusion could not present a constitutionally unsound risk of erroneous deprivation in a school disciplinary proceeding that was civil in nature.³⁴³ Moreover, given Gibney's concession that she had at times responded to Haidak with violence, admission of the evidence would have been redundant, zeroing out its impact on Haidak's deprivation risk.³⁴⁴

Finally, the *Haidak* court turned to the third *Mathews* factor to explore the public interest.³⁴⁵ There, it accounted for the administrative and financial costs of requiring the University to allow the requested procedures, reasoning that such costs were unjustifiable.³⁴⁶ But it also pushed beyond this element, clearly identifying that the public interest involved the University's broader interests beyond cost.³⁴⁷ These included an "interest in protecting itself and other students from those whose behavior violates the basic values of the school"³⁴⁸ and "in balancing the need for fair discipline against the

³³⁷ See *id.*

³³⁸ *Id.* at 67.

³³⁹ See *id.*

³⁴⁰ See *id.*

³⁴¹ *Id.*

³⁴² See *id.*

³⁴³ See *id.* at 67–68 (demonstrating that, even under the Federal Rules of Evidence, Haidak's proffered pieces of evidence could have been properly excluded).

³⁴⁴ *Id.* at 68 ("And in any event, the evidence was redundant. Haidak testified – and Gibney did not dispute – that 'a lot of these instances occurred, these sort of instances where she would become violent when she was drunk'").

³⁴⁵ *Id.* at 68.

³⁴⁶ See *Goss v. Lopez*, 419 U.S. 565, 583 (1975) ("To impose . . . even truncated trial-type procedures might well overwhelm administrative facilities in many places and, by diverting resources, cost more than it would save in educational effectiveness.").

³⁴⁷ See *id.* at 68.

³⁴⁸ *Id.* at 66 (quoting *Goss*, 419 U.S. at 580).

need to allocate resources toward ‘promot[ing] and protect[ing] the primary [educational] function of institutions.’”³⁴⁹ Finally, the court reasoned that all parties “share[d] an interest in speed and accuracy in the adjudication of the charges.”³⁵⁰

The court also acknowledged the University’s interest in preserving the wellbeing of both students during the hearing process through its cross examination analysis.³⁵¹ It reasoned that when student parties to campus sexual misconduct disciplinary proceedings are allowed to directly question one another, “schools may reasonably fear that student-conducted cross examination will lead to displays of acrimony or worse.”³⁵² This reasonable fear counterbalanced possible benefits sufficiently under the *Mathews* analysis to yield a finding that cross examination was not required.³⁵³ In stark contrast to the *Baum* opinion, then, the *Haidak* court analyzed the University’s interests beyond the narrow confines of financial and administrative costs, better adhering to the *Mathews* Court’s command of balancing all competing interests.³⁵⁴

However, *Haidak* still comes up short. Recall that given the fact that campus sexual misconduct disciplinary proceedings factually differ from *Goss* and *Mathews* due to the presence of a student-complainant, the third *Mathews* factor should also account for that party’s distinct interests.³⁵⁵ The *Haidak* court here missed an opportunity under the third factor to consider the complainant’s risk of erroneous deprivation of her access to education, her reputation, and her professional and financial prospects as affected by the violence she had faced, the continued harassment to which she was being subjected, and the potential institutional betrayal by the University.

In the end, the court concluded that the expulsion hearing did not deprive *Haidak* of due process,³⁵⁶ and though the suspension hearing did, it ultimately caused him no actual injury.³⁵⁷ Considering the holistic nature of the analysis outlined above, the outcome in *Haidak* carries greater weight than, for instance, the *Baum* opinion. But the *Haidak* court’s truncated third *Mathews* factor analysis still leaves room for improvement that would lend itself to a more reliable, accurate balancing analysis. Courts concerned with faithfully applying *Mathews* and accounting for the factual differences between student-on-student discrimination, harassment, or violence cases and other forms of school-versus-student disciplinary proceedings should take care to acknowledge the layered impacts of both allegations and experiences

³⁴⁹ *Id.* (quoting *Gorman v. Univ. of Rhode Island*, 837 F.2d 7, 14 (1988)).

³⁵⁰ *Id.*

³⁵¹ *See id.* at 69.

³⁵² *Id.* at 69.

³⁵³ *See id.* at 69–71.

³⁵⁴ *See* Section II, *supra*.

³⁵⁵ *See* Section II(B), *supra*.

³⁵⁶ *Haidak*, 933 F.3d at 71.

³⁵⁷ *Id.* at 73.

of violence alike. Only when complainants', respondents', and universities' significant stakes in fair adjudication of sexual misconduct complaints are taken into account will the *Mathews* due process analysis yield a truly balanced outcome.

III. RESTORING SURVIVORS TO THE SCALES

As with any policy issue, Title IX is susceptible to both fault and repair from a multitude of different angles. Title IX's enforcing administrative agency, the Department of Education, holds the power to issue guidance documents and promulgate binding rules interpreting the statute. Where Congress wishes to direct the course of interpretation, it may codify certain requirements or restrictions, whether under the Higher Education Act or some other legislative vehicle. Educational institutions, too, have the latitude to take a leadership role in clarifying and enforcing the command of Title IX, as it binds schools directly.

Each of these three mechanisms has its strengths and drawbacks, outlined briefly below, as a means of ensuring the integrity of Title IX—particularly with respect to the fairness concerns explored in depth in Section II, *supra*. Ultimately, however, the courts are the constitutional backstop for all of these avenues. This means sexual misconduct disciplinary proceedings are only as fair as the least fair court ruling on the question. To ensure that this bar remains high, preserving the rights and respecting the interests of all respondents, complainants, and schools alike, the courts must adequately balance all of the interests at stake. They have largely failed to do so thus far. We therefore call for a revamping of courts' analyses to comport with *Mathews*' holistic balancing approach and suggest several ways advocates for educational equity and fairness can affirmatively push for improved assessments in the courts. Only with a baseline of equity and fairness as the constitutional floor can all students expect a future in which their civil rights in education carry the full weight of their promise.

A. Department of Education

In recent decades, the Department of Education has issued guidance clarifying schools' duty to uphold Title IX and leveraged its authority to withhold federal funds³⁵⁸ to enforce the law. Historically, OCR has also enforced the rights of respondents—finding schools in violation of respon-

³⁵⁸ The Department of Education did not use their power to withhold federal funds until 2018. David Jackson et al., *Federal Officials Withhold Grant Money from Chicago Public Schools, Citing Failure to Protect Students from Sexual Abuse*, CHI. TRIB. (Sept. 28, 2018), <https://www.chicagotribune.com/news/breaking/ct-met-cps-civil-rights-2018-0925-story.html> [<https://perma.cc/7D4A-NJS8>].

dents' rights for their failure to provide notice of allegations or hearings³⁵⁹ and their issuance of punishment through informal resolutions.³⁶⁰ Prior guidance from OCR also provided extensive procedural protections for respondents in sexual misconduct cases.³⁶¹ Since the Department serves as the enforcement mechanism of Title IX, OCR is in a position to settle the battle over Title IX by enforcing the statute's ban on sex discrimination while upholding procedural fairness for all. To increase procedural protections for all parties, the Department could work with both leaders in the respondents' rights movement and survivor advocates to issue guidance that is fair and responsive to all parties. This guidance could provide robust procedural protections to all parties by addressing issues around lack of notice, biased sexual misconduct proceedings, reasonable supportive measures and accommodations, and lengthy timelines.

Sadly, the DeVos Department of Education has largely listened only to respondents' rights groups and higher education lobbies.³⁶² Meeting with survivors and their advocates only once³⁶³ and failing to properly consider legal precedent and social science, the Department in late 2018 issued sweeping proposed changes to Title IX that would drastically limit the rights of complainants and confer special rights on respondents.³⁶⁴ Although hope remains that future Departments may be able to more fairly balance the interests of all parties, public perception that the Department of Education is a partisan arm of the executive projects a gloomy future in that respect.³⁶⁵

B. Legislatures

With Title IX serving as the baseline, Congress and state legislators have worked to bolster procedural protections for all parties in sexual misconduct cases, as discussed in Section I(C), *supra*. Since they are elected and

³⁵⁹ Letter from Beth Gellman-Beer, Supervisory Attorney, Philadelphia Office for Civil Rights, U.S. Dep't Educ., to Robert E. Clark II, President, Wesley Coll. (Oct. 12, 2016), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/03152329-a.pdf> [<https://perma.cc/G9UB-XE2C>].

³⁶⁰ Letter from Alice B. Wender, Regional Office Director, Office for Civil Rights, U.S. Dep't Educ. to Dr. Teresa Sullivan, President, University of Virginia (Sept. 21, 2015), <https://www2.ed.gov/documents/press-releases/university-virginia-letter.pdf> [<https://perma.cc/CQF9-XHD7>].

³⁶¹ Alexandra Brodsky, *A Rising Tide: Learning About Fair Disciplinary Process from Title IX*, 66 J. LEGAL EDUC. 822, 831 (2017) ("Yet Title IX guidance and the Campus SaVE Act are not merely compatible with due process but provide more robust procedural protections for both parties than does the Constitution—or any other federal law or regulation.").

³⁶² Bolger, *supra* note 107.

³⁶³ Burns, *supra* note 6.

³⁶⁴ Know Your IX Comment, *supra* note 62.

³⁶⁵ Robert Shapiro et al., *American Public Opinion and Partisan Conflict: Education's Exceptionalism?*, COLUM. U. 22 (April 22, 2016), https://www8.gsb.columbia.edu/leadership/sites/leadership/files/ShapiroKilibardaHarvardMay5_2016Paper%20with%20Figures.pdf [<https://perma.cc/PU43-9H46>].

representative of their constituents, legislatures have the opportunity to be publicly perceived as more democratic and thus more legitimate than, for example, the partisan executive. Congress and state legislators could work with all interested parties to craft bills, either through the Higher Education Act or other legislative vehicles, to prescribe a fair and balanced approach to the on-campus adjudication of sexual misconduct cases. Federally, Congress has immense opportunity to bolster schools' responses responding to sexual violence and ensure the rights of both parties are upheld and enforced. Further, given that Congress sets the parameters of what the Department may interpret, and given that courts are only able to intervene in legislative action in limited circumstances, Congress is best positioned to affirmatively provide strong procedural rights for both parties that are fixed and not subject to the whims of the shifting executive. Sadly, the likelihood of Congress doing so is slim; the 116th Congress has passed just one percent of proposed legislation and only four percent of bills have received a hearing.³⁶⁶

State legislatures also have the latitude to secure the rights of all parties to campus sexual misconduct cases at the local level. States could not only pass legislation to instruct schools on how best to implement Title IX but could also give local departments enforcement power. This could allow students who experience a violation of their rights the opportunity to file complaints locally, where a response may be more prompt and tailored to local interest, given that federally, OCR had more than 305 pending cases at the time this article was written.³⁶⁷

Although we believe state and local governments should be working to end sexual violence in their schools and uphold the rights of all parties, however, state law is not the final answer. State legislators may fold to partisan lobbyist interests in the same way as Congress and the Department. As discussed in Section I, *supra*, legislators and lobbyists have attempted to gut, rather than improve, Title IX. Finally, state law is subject to change following action from Congress and the Department, given federalism concerns, and still must comply with parameters of constitutionality as determined by the courts.

C. *Colleges and Universities*

Courts have historically practiced great deference—within statutory and constitutional³⁶⁸ bounds—with respect to educational institutions' governing

³⁶⁶ *Statistics and Historical Comparison*, GOVTRACKER, <https://www.govtrack.us/congress/bills/statistics> [<https://perma.cc/F992-ZMNC>] (last visited Dec. 14, 2019).

³⁶⁷ *Title IX Tracking Sexual Assault Investigation*, CHRON. HIGHER EDUC., <http://projects.chronicle.com/titleix/> [<https://perma.cc/Q6L6-8NJZ>] (last visited Mar. 30, 2020).

³⁶⁸ *See, e.g.*, *Goss v. Lopez*, 419 U.S. 565, 574 (1975) (“[T]he State is constrained to recognize a student’s legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause.”);

policies.³⁶⁹ The executive and judicial branches serve as enforcement mechanisms for such policies to ensure their compliance with governing laws and constitutional principles, but this does not constrain schools from proactively enacting equity-oriented policies. Further, given the local expertise schools hold, they are best positioned to tailor institutional responses to sexual misconduct to their specific communities' needs and resources. Thus, schools committed to educational and gender equity have an opportunity to consider the full spectrum of complainant, respondent, and institutional interests at stake and to balance those appropriately against one another when developing institutional policies for sexual misconduct disciplinary proceedings.

However, schools alone cannot solve the issue of fairness. Because schools are first and foremost businesses—even if not-for-profit—they frequently act to protect their bottom lines. This often means schools defend vigorously against challenges by students in the courts and OCR. Alternatively, schools often avoid the Department's withdrawal of federal funds by coming to an agreement with OCR to reform certain policies that will bring their institution into compliance.³⁷⁰ Although the voluntary compliance model incentivizes reform,³⁷¹ schools will still vigorously defend against administrative charges and civil lawsuits to avoid the threat of losing federal funds. Financial solvency, then, serves as a perverse incentive pushing schools to position themselves in opposition to students' civil rights.³⁷² Even schools with the fairest policies will likely face administrative and legal challenges by students—particularly from respondents, who have proven highly litigious³⁷³—so these accountability mechanisms must be sound to affirm schools' policies and to charge them to improve where appropriate. When bottom lines and civil rights butt heads, some outside enforcement

Tinker v. Des Moines Community Sch. District, 393 U.S. 503, 506 (asserting that students do not “shed their constitutional rights . . . at the schoolhouse gate”).

³⁶⁹ See, e.g., *Goss*, 419 U.S. at 578 (“Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint . . . By and large, public education in our Nation is committed to the control of state and local authorities.”) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)).

³⁷⁰ See *About OCR*, U.S. DEPT EDUC. (last modified Jan. 1, 2020) <https://www2.ed.gov/about/offices/list/ocr/aboutocr.html> [<https://perma.cc/5657-HT5Y>] (“OCR also provides technical assistance to help institutions achieve voluntary compliance with the civil rights laws that OCR enforces.”).

³⁷¹ See *id.*

³⁷² See e.g., Arlinda Smith Broady, *Gwinnett Schools Lose Bid to Dismiss Suit Over Sex Assault Case*, ATL. J. CONST. (Aug. 27, 2019), <https://www.ajc.com/news/local/gwinnett-schools-lose-bid-dismiss-suit-over-sex-assault-case/t5BivX6m4Mnx4A361srr-EL/>, (“A federal court has denied Gwinnett County Public Schools’ motion to dismiss a lawsuit claiming that its handling of a 2015 sexual assault complaint violated a female student’s civil rights. Gwinnett officials said they can’t comment on active lawsuits. But the school district has denied any wrongdoing”).

³⁷³ See e.g., Jonathan Taylor, *Milestone: 600+ Title IX/Due Process Lawsuits in Behalf of Accused Students*, DIGITAL J. (Apr. 3, 2020), <http://www.digitaljournal.com/pr/4641224>, (Outlining how over six hundred lawsuits have been filed against colleges and universities in behalf of students accused of Title IX-related offenses) [<https://perma.cc/79RF-6388>].

mechanism must be the safety net that catches students for whom schools fail to care.

D. Courts

In the American system of checks and balances, courts are the ultimate backstop for constitutional challenges. Because respondents' due process challenges are constitutional in nature, the courts unequivocally have the final say on these matters. This means that proactive legislative, administrative, and institutional policy efforts remain critical to promoting visions of fairness in schools' adjudication of sexual misconduct cases, but courts ultimately hold the power to affirm or undermine those efforts. Given this reality, advocates for educational equity cannot realize students' civil rights without engaging with the courts.

As explained in Section II, *supra*, the prevailing structure of the *Mathews* analysis governing due process challenges has been misinterpreted as a balancing of student respondents' interests with the public interest, construed narrowly to only encompass fiscal and administrative costs to the educational institution. In fact, universities' interests are coextensive with complainants' interests in educational access and general wellbeing, and the public interest factor should also account for survivors' interests in and of themselves. Recent case law demonstrates that courts have failed to adequately consider those interests, leaving complainants off the scales of fairness entirely.³⁷⁴ Ideally, courts will begin recognizing that they must interweave survivors' interests as a matter of basic fairness and accuracy in the adjudication of campus sexual misconduct due process challenges. But unless and until they do so, we propose three main avenues for addressing this problem:³⁷⁵

1. Universities should account for general policy interests and the specific interests of student complainants in their briefing.

Universities have largely failed to set out their own policy interests and their investment in student complainants' interests as part of their reasoning in affording or restricting certain procedures in sexual misconduct disciplinary proceedings. This grievous omission gravely impacts student complainants, as courts addressing due process challenges can more easily—and even

³⁷⁴ See Section II, *supra*.

³⁷⁵ We outline these proposals briefly below but view a fully detailed map of how exactly courts should consider these interests as falling outside the scope of this article. We do encourage legal scholars to begin to consider if courts should weigh the interests of survivors in due process cases as individuals, or as complainants more generally. As we are not litigators, we believe it is important for folks who are to consider the implications for both of these routes. Questions that come to mind include: Should courts re-examine the facts of a case when balancing a survivor's interests? Or should the complainant be involved in these legal proceedings themselves?

unintentionally—leave out critical pieces of the equation. In fact, the *Baum* court pointed to just that failure by the school as part of the reasoning under the third *Mathews* factor: “[I]mportantly, the university identifies no substantial burden that would be imposed on it if it were required to provide an opportunity for cross examination in this context.”³⁷⁶ Because in that particular scenario, cross examination introduced negligible administrative and fiscal costs to the university, and because the university alleged no other potential costs, the court skated over the public interest analysis, enabled by shoddy briefing.³⁷⁷ This problem could have been prevented—or at least, perhaps, leveraged as grounds for reconsideration on appeal—if the university had more thoroughly briefed its interests.

2. Survivors and advocates should consider intervening in due process challenges where complainants’ interests are at stake.

The option of intervening to become a party to a pending lawsuit likewise poses an opportunity for survivors and advocates to sculpt a more well-rounded understanding of the public interest at stake in sexual misconduct cases. In federal courts, parties may intervene as of right where they claim an interest relating to the transaction at issue such that the disposal of the action may impair that party’s ability to protect its interest.³⁷⁸ Federal courts may also allow parties to intervene where they have a claim that shares a common question of law or fact with the pending action.³⁷⁹ Given the interests of student complainants laid out in this article, and given the very real way in which an erroneous finding of no responsibility for a student respondent jeopardizes the educational access of a student complainant and others on campus, survivors and advocates have ample opportunity to apply to the courts to be admitted as an intervening party in due process cases.³⁸⁰

3. Advocates should submit amicus briefs in due process challenges to ensure courts consider the full spectrum of concerns within the purview of the third *Mathews* factor.

Even where survivors and advocates cannot or do not become intervening parties, they can put forth a more thorough understanding of the public interest at stake in a campus sexual misconduct proceeding through filing amicus, or “friend of the court,” briefs. Respondents’ rights groups such as FIRE have done so diligently, providing courts a more detailed analysis of the interests at stake for student respondents to campus sexual misconduct

³⁷⁶ *Doe v. Baum*, 903 F.3d 575, 582 (6th Cir. 2018).

³⁷⁷ *See id.*

³⁷⁸ Fed. R. Civ. P. 24(a)(2).

³⁷⁹ Fed. R. Civ. P. 24(b)(1)(B).

³⁸⁰ Of course, this is not a simple process, and it is one that requires heavy resources to which many survivors may not have ready access.

proceedings.³⁸¹ These briefs bolster the first two *Mathews* prongs. Given that respondents' interests are already well-represented in courts' traditional application of the *Mathews* analysis, this effort on the part of RRGs magnifies the need for other advocacy groups to submit amicus briefs enunciating the public interest—including universities' policy interests and complainants' individual interests—encompassed under the third *Mathews* factor. Only then will courts be presented with all the relevant interests that must be balanced to yield a fair outcome.

IV. CONCLUSION

As survivors and survivor advocates, we know first-hand how unfair disruptions in education can have lasting consequences. That is why we believe it is essential for all parties involved to collaborate to build robust protections that ensure a fair process for all. Conversations about the future of campus sexual violence and Title IX must be rooted in a genuine commitment to accuracy, equity, and fairness; these conversations cannot be driven by nonfactual talking points or inflexible ideologies. We wholeheartedly believe it is possible to build institutional, legislative, and judicial structures that aid survivor healing, work toward safer campuses, and respect the rights of all parties involved. We implore universities, respondent interest groups, and the general public to set aside outcome-oriented thinking and engage authentically with us in a critical, nuanced discussion aimed at building that future. We recognize that this task is not an easy one, but with the stakes so high, it is a worthy one. As Secretary DeVos herself once said, “[t]he truth is: we must do better for each other and with each other.”³⁸²

³⁸¹ See, e.g., *Haidak v. Univ. of Massachusetts*, 933 F.3d 56, 69 (1st Cir. 2019) (citing Amicus brief filed by a Respondents' rights group).

³⁸² Svruga, *supra* note 3.